Supreme Court of the United States

OCTOBER TERM, 1925.

In the Matter

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,
Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO and A. POPPER,
Petitioners-Appellants,

MIDDLETON S. BORLAND,
Trustee-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper and Emil Hochstein, as copartners doing business under the firm name and style of N. Latzko and A. Popper, respectfully shows:

I.

Nature of Proceedings and Decision Below.

In the bankruptcy proceedings of Knauth, Nachod & Kuhne, petitioners filed a reclamation claim for $19,294, being the proceeds of three checks, for $1,294, for $3,000, and for $15,000, respectively, alleged to have been deposited with the bankrupts by three New York banks, and collected by still another New York bank (in which they had been redeposited by the bankrupts), subsequent to the filing of the involuntary petition in bankruptcy against the bankrupt. The proceeds of all of said three checks were duly traced by your petitioners into the possession of the trustee for the bankrupts.

Your petitioners are Hungarian bankers, who maintained a current account with the bankrupts. The three checks in question were delivered by New York banks to the bankrupts, with instructions, either stated on the face of the checks, or in accompanying memoranda, that said checks were delivered by the New York banks to the bankrupts "in favor of" or "for account of" your petitioners. The Circuit Court of Appeals for the Second Circuit held that these words were expressions restricting the negotiability of said checks, and constituted the bankrupts merely agents for the collection of said checks for the benefit of petitioners, the principals. The Circuit Court of Appeals accordingly allowed the reclamation claim of the petitioners as to the check for $1,294 on the ground that the words "in favor of" petitioners appeared on the face of the check, but disallowed the claim for $15,000 on the ground that the words "for account of" petitioners appeared only in the written instructions accompanying the delivery of the check while the check itself was non-restricted on its face.

The claim for $3,000 was also disallowed on the ground that in the opinion of the court said check was, as a mat-

ter of fact, collected prior to the filing of the petition in bankruptcy.

In applying to this Honorable Court for a writ of *certiorari*, petitioners desire to review only so much of the decision of the Circuit Court of Appeals as relates to the check for $15,000.

II.

Errors of the Circuit Court of Appeals.

In distinguishing between the checks for $1,294 and $15,000, the Circuit Court of Appeals, as your petitioners are advised, made a distinction which is both untenable in principle and contrary to an unbroken line of authorities, set forth in the brief of your petitioners:

1. The relationship between a bank and its depositors is a contractual one, determined in each particular transaction by the terms of the contract. It is elementary that the rules governing the construction of contracts apply to the rules governing the construction of negotiable instruments. It is also firmly established that in construing a contract, all the papers relating thereto are taken into consideration and that the intention of the parties thereto must be gathered from all the writings relating to the contract, executed simultaneously with the entry into same. The same rule governs the relationship between a bank and its customers, which springs up at the time negotiable instruments are delivered by a customer to the bank. Hence, as between your petitioners and the bankrupts, the written instructions of the New York bank, accompanying the check for $15,000, advising the bankrupts that the same is delivered to them merely "for account of" your petitioners constituted a part of the contract between the bankrupts and your petitioners in so far as said check for $15,000 was concerned. And the Circuit Court of Ap-

peals was in error when it refused to consider said instructions as part of the terms which governed the delivery to the bankrupts of said check for $15,000 and as indicating the intention on the part of the New York bank that prior to the collection of the proceeds of said check by the bankrupts, there should be a relationship of agent and principal between the bankrupts and your petitioners, and not that of creditor and debtor.

2. This Honorable Court, in the case of *White* v. *Miners' National Bank*, 102 U. S., 658, held that in construing an endorsement "Pay S. V. W. or order for account M. N. B.":

> "The language of the endorsement is *without ambiguity*, and *needs no explanation* either by parol proof or by resort to usage."

The record herein is barren of any facts whatsoever showing that the parties in question intended that the expression "for account of" as used by the New York bank in the memorandum accompanying the delivery of the check for $15,000 be used in any other sense than that implied to it by law. Consequently, we respectfully submit that, even apart from the fact that said expression was heretofore held by this Honorable Court to be a commercial expression, unambiguous in its meaning, and having settled legal import, the Circuit Court of Appeals had no facts before it upon which it could base its decision, holding, as it did, that the said words "for account of" in said memorandum did not have their settled legal import but were merely words indicating the manner of bookkeeping entry.

3. It has repeatedly been held that in interpreting technical words and expressions used in any particular branch of commerce, trade or finance, the meaning which is usually attributed to such words and expressions in

that particular branch of commerce, trade, or finance must be given to them. In this particular case, the instructions accompanying the check for $15,000 were written by a New York bank, presumed to be familiar with the banking and legal meaning of the technical words and expressions used in banking transactions. To impute to said bank, without a scintilla of evidence in support of said conjecture, that it used the expression "for account of" in the sense of a bookkeeping entry and not in the sense of a restriction upon negotiability of said check of $15,000, it is respectfully submitted, was a clear error on the part of said Circuit Court of Appeals, and this is still more so, because said expression, being unambiguous, cannot be varied or qualified either by parol evidence or by speculative inferences.

4. The expression "for account of" in connection with negotiable instruments is held to imply the relationship of principal and agent between the depositor and the bank, because it signifies that the proceeds of the negotiable instruments are to be held by the bank for the use of the depositor. "The plain meaning of which is that the acceptor of the draft is to pay to the indorsee, *for the use of the indorser.* The indorser is to receive it *on account of* the indorsee" (*White* v. *Miners National Bank, supra*). Whether the words "for account of" were used by the New York bank upon the face of said checks or in the accompanying memorandum, it is clear that the New York bank did not intend to pay the proceeds of said check to the bankrupts for their own use, *but for the use of your petitioners.* The transactions with all said checks took place in the City of New York. The New York Negotiable Instruments Law provides in Sections 35 and 66:

> "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. * * *,

the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, *and not for the purpose of transferring the property in the instrument.*"

"An indorsement is restrictive, which either: (3) Vests the title in the indorsee in trust for *or to the use of some other person.*"

Thus, either under the decision of this Honorable Court in *White* v. *Miners' National Bank, supra,* or pursuant to the terms of the New York Negotiable Instruments Law, it was error on the part of the Circuit Court of Appeals to hold that the relationship of debtor and creditor was created between the bankrupts and your petitioners, upon delivery by the New York bank of said check for $15,000 to the bankrupts with a memorandum attached to it stating that it was so delivered "for account of" your petitioners.

5. The Circuit Court of Appeals held in regard to said check for $15,000 that its "proceeds when collected on June 16th *belonged not to the petitioners or the bankrupts,* but to the bank which was the owner of the check when it was collected" (Record, fol. 253). This holding of the Circuit Court of Appeals is also deemed an error, since there are numerous decisions to the effect that when the bank of deposit fails to transmit the instructions given to it by the depositor (showing that the relationship between it and its depositor is that of principal and agent and not of debtor and creditor), the depositor, upon the bankruptcy of the bank of deposit, is entitled to follow the proceeds of the negotiable instruments, endorsed by him in blank, but deposited for collection, as aforesaid, into the assets of the collecting bank, providing the col-

lecting bank does not acquire superior equities thereto. In the case at bar, not only the collecting bank did not claim or acquire any equities upon the proceeds of said check, but the trustee for the bankrupts actually used said proceeds to pay off the indebtedness of the bankrupt to said collecting bank and received from said collecting bank pledged securities of the bankrupts, the market value whereof was far in excess of the amount of said loan. It is submitted, that your petitioners, having completely traced their trust funds into specific fund forming part of the estate of the bankrupts herein, are entitled to reclaim the same as preferred *cestuis que trust.*

III.

Important Questions of Commercial Law are Involved.

The questions of law presented upon this application for a writ of *certiorari* are of vital and outstanding importance to the large mass of bank depositors, individual and corporate, throughout the country, and also to the banking community at large. They are questions of general commercial law upon which uniformity of decisions is essential, particularly as they concern every day practice, involving numberless transactions of the same type.

In so far as the Circuit Court of Appeals held that it is entitled to construe the expression "for account of" in a sense otherwise than that attributed to it generally in the banking transactions, the decision certainly conflicted with the clear decision of this Honorable Court in *White* v. *Miners' National Bank, supra,* holding that such expression was unambiguous and could not be varied by parol evidence. Still less could it be varied by mere inference, without any basis of fact in the record.

Of still greater importance is the second question involved in this case, to wit, the clear holding of the Circuit Court of Appeals that in construing the relationship be-

tween the depositor and the bank, it will merely consider the negotiable instrument itself and not the memorandum accompanying it. This conclusion of the Circuit Court of Appeals is not supported by citation of any Federal authority. In fact, in this respect, the decision of the Circuit Court of Appeals is of first impression. In *Boone County National Bank* v. *Latimer,* 67 Fed., 27, the court apparently assumed the contrary doctrine, but did not enunciate it in its opinion. On the other hand, the decision of the Circuit Court of Appeals in the case at bar is contrary to the decisions of the Court of Appeals of Kentucky, the Court of Civil Appeals of Texas, Supreme Court of Alabama, the Court of Appeals of New York and other courts of appellate jurisdiction. Your petitioners feel that if, in respect to the construction of the memorandum accompanying delivery of a negotiable instrument by a depositor to his bank, the Federal rule is to be different from the rule in force in practically every state jurisdiction throughout the country, it should have the authority of your Honorable Court. On this point the Circuit Court of Appeals came in direct conflict with the decision of the Court of Appeals of New York (*Bank of America* v. *Waydell,* 187 N. Y., 115, 120). Even assuming that the decision of the Circuit Court of Appeals for the Second Circuit would not be accepted in the other circuits, it will have to be considered as ruling law in its own circuit, covering, as it does, the district wherein most of the nation's banking business is conducted. The evil of having two rules, one Federal and one State, on such an important and frequent question of commercial and banking law, is too apparent to require further argument.

Finally, in so far as the Circuit Court of Appeals decided that the depositor, who delivers a negotiable instrument signed in blank but with instructions constituting in regard to the deposit between him and his bank, the relationship of principal and agent, is deprived of the benefit of such instructions when his bank, contrary

thereto, omits to transmit said instructions to its corresponding bank which actually collects the proceeds thereof, it came into conflict in principle with its own previous decision to the contrary in *Re Berry* (147 Fed., 208). In the *Berry* case, a firm of stockbrokers, through an error of fact, paid to another firm of stockbrokers $1,500. Three days later an involuntary petition in bankruptcy was filed against the payees. Said sum of $1,500 was paid by two checks, which payees deposited at once with their bank, and subsequent thereto a balance of over $6,000 was handed by the payees' bank to the receiver. The Circuit Court of Appeals for the Second Circuit then held that neither payees nor their trustee had title to said $1,500, and as the sum paid by the collecting bank to the trustee exceeded $1,500, the drawers of the checks were entitled to receive from the trustee $1,500 as preferred *cestuis que trust*.

In the *Berry* case the trust relationship was established by a mistake of fact; in the case at bar—by instructions to the bankrupts constituting them agents for your petitioners to collect the proceeds of said check for $15,000. In both cases the bankrupts had no title to the proceeds of checks made payable to them on the face thereof, and deposited by them prior to bankruptcy to their current checking accounts with their banks.

The Circuit Court of Appeals asserted that its decision on this point in the instant case is based upon *Burton* v. *United States* (196 U. S., 283). We respectfully submit that all that the *Burton* case decided was that a deposit of negotiable instruments endorsed in blank by a depositor to his current checking account with his bank, *without anything else said or done*, establishes the relationship of debtor and creditor between the depositor and his bank. The extension of this doctrine to a re-deposit of said depositor's negotiable paper by his bank with another bank, or to the case where specific instructions accompany the deposit, is unwarranted in principle and is not based upon any authority.

WHEREFORE, in view of the fact that the decision below is untenable and that the important questions of banking and commercial law presented should be settled by this Honorable Court, your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, demanding them to certify and send to this Honorable Court, on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings in this case, *In Re Gubelman*, No. 52 (November Term, 1925), to the end that the said case may be reviewed and determined by this Honorable Court, pursuant to the statute therefor provided, and that your petitioners may have such other and further relief in the premises as this Honorable Court may deem appropriate, and that the decree of said Circuit Court of Appeals in said case as to said check of $15,000, may be reversed by this Honorable Court.

ALEXANDER LATZKO,
WILLIAM LATZKO,
CHARLES LATZKO,
SAMUEL POPPER,
EMIL HOCHSTEIN,
By BRODEK & RAPHAEL,
Attorneys-in-fact.

United States of America,
Southern District of New York, } ss.:
State and County of New York,

Charles A. Brodek, being duly sworn, deposes and says as follows:

I am one of the co-partners of Brodek & Raphael, a partnership, with its principal office at No. 67 Wall Street, in the Borough of Manhattan, City, County and State of New York, who are attorneys-in-fact for Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper and Emil Hochstein, co-partners doing business under the name and style of N. Latzko and A. Popper.

I have read the foregoing petition and the same is true to the best of my knowledge, information and belief.

CHARLES A. BRODEK,

Subscribed and sworn to before me
this 5th day of April, 1926.

LOUIS P. EISNER,
Commissioner of Deeds,
New York City.
Term expires May 20, 1926.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and the case is one in which the prayer of the petitioners should be granted by this Honorable Court.

Dated, New York, April 5, 1926.

CHARLES A. BRODEK,
Counsel for Petitioners.

BRIEF OF THE PETITIONERS.

Facts.

This is an application for a writ of *certiorari* for a partial review of the decision of the Circuit Court of Appeals for the Second Circuit in a reclamation proceeding by petitioners, arising out of the bankruptcy proceedings of Knauth, Nachod & Kuhne. It involves a number of fundamental and important questions of banking and commercial law. In particular, it is concerned with the question of title to negotiable instruments, as between depositor and his bank.

The Circuit Court of Appeals considered the title to three checks, to wit, a check for $1,294, drawn by the National City Bank of New York, to the order of the bankrupts, in favor of the petitioners, deposited by the National City Bank with the bankrupts on June 15th, 1923 (fols. 88-90); a check for $3,000, drawn by the Irving Bank-Columbia Trust Company, to the order of the bankrupts, and deposited with them for the credit of the petitioners on June 14th, 1923 (fols. 82-87); a check for $15,000 drawn by Goldman, Sachs & Company, on the Bank of America, to the order of the bankrupts, accompanied by written directions from said Goldman, Sachs & Company to the bankrupts that said check is paid for the account of the petitioners by order of Julius Baer & Co. of Zurich, Switzerland. The check for $15,000 was delivered to the bankrupts on June 15th, 1923 (fols. 91-93).

An involuntary petition in bankruptcy was informally filed with United States District Judge Knox at 10:30 P. M. on June 15th, 1923, and formally filed with the Clerk of the United States District Court for the Southern District of New York at 9:30 A. M. on June 16th, 1923 (fols. 14 and 15). On June 15th, 1923, the bankrupts deposited said checks for $1,294 and $15,000 with the

American Exchange National Bank of New York, wherein the bankrupts had a current checking account, as the bankrupts were not members of the New York Clearing House. On June 16th, 1923, and subsequent to 9:30 A. M., the American Exchange National Bank collected the said checks for $1,294 and $15,000 respectively, through the New York Clearing House and credited the proceeds thereof to the account of the bankrupts with it (fols. 90 and 95). *The bankrupts did not transmit with the check for $15,000 the instructions of Goldman, Sachs & Company, that said check was delivered to them "for account of Latzkopper, Budapest."*

At the time of the filing of said petition in bankruptcy, the bankrupts were indebted to the American Exchange National Bank in the sum of $250,000, plus interest thereon, which loan was secured by deposit of stocks and bonds. The market value of said stocks and bonds at all times exceeded the amount of said loan and interest (fols. 30 and 156). Thereafter, and pursuant to the orders of the Receiver for the bankrupts, the American Exchange National Bank sold part of the securities and applied the proceeds thereof to the liquidation of said loan, without attaching at any time the sums which stood to the current account of the bankrupts with it (fols. 169-175). Said current account, at the time of the bankruptcy, amounted to a balance in favor of the bankrupts of approximately $211,000, which balance naturally included the proceeds of said checks for $1,294 and $15,000 (fol. 158).

Thereafter, and on July 12th, 1923, the Receiver for the bankrupts instructed the American Exchange National Bank to charge said balance on the bankrupts' current account with it to the liquidation of said loan, and in addition thereto delivered his check for a sum over $18,000, for the difference between the amount of said current account and the balance of said loan (fols. 169-171). Upon the liquidation of said loan from the American Exchange National Bank to the bankrupts, effected in the above manner, the American Exchange National Bank delivered

the stocks and bonds of the bankrupts, which it held for security of said loan, to the Receiver (fols. 172-176). It is admitted that the proceeds of the sale of said securities by the Receiver exceeded the sum of $211,000, the balance of said current checking account of the bankrupts with the American Exchange National Bank. Thus, the petitioners have completely fulfilled the duty of tracing the proceeds of their two checks into the specific fund now held by the trustee for the bankrupts.

The Circuit Court of Appeals held that the petitioners were entitled to the proceeds of said check for $1,294 because the words "in favor of" on the face of the check restricted its negotiability and made both the bankrupts and the American Exchange National Bank mere agents of the petitioners for the collection of the same (fols. 246, 247). It further held that the petitioners were not entitled to the proceeds of said check of $3,000 on the ground that the law takes notice of the fractions of the day for the purpose of determining the title to the property of the bankrupt, and that since said check was collected on June 15th, 1923, prior to the filing of the petition in bankruptcy herein, the title to the proceeds thereof passed to the bankrupts prior to said filing of said petition in bankruptcy (fols. 209 and 228). It finally held that petitioners were not entitled to the proceeds of said check of $15,000 on the ground that in ascertaining title to negotiable instruments, the court merely looks to the form of the instrument itself and not to the writings or instructions accompanying the same, and upon the further ground that the bankrupts, by depositing said unrestricted check with the American Exchange National Bank prior to the bankruptcy, transferred the title to it to the American Exchange National Bank (fols. 252-254).

This application for a writ of *certiorari* to said Circuit Court of Appeals seeks to review the decision of that court only in so far as it affects said check of $15,000.

(Italics throughout this brief are ours, unless otherwise indicated.)

POINT ONE.

The Circuit Court of Appeals erred in holding that the memorandum accompanying the check for $15,000 and stating that the same was delivered to the bankrupts "for account of" petitioners did not constitute a part of the contract between them in regard to the deposit of said check.

It is elementary that the general rules governing the construction of all contracts apply equally to negotiable instruments, so far as their construction is concerned. In particular, a negotiable instrument must be construed in the light of a separate contemporaneous oral or written agreement as forming one single contract with it.

8 *Corpus Juris*, 85.

In the case at bar, the Circuit Court of Appeals said:

> "The important fact is that this $15,000 check is on its face a straight unrestricted cashier's check payable to the order of the bankrupts. The petitioners state they caused Goldman, Sachs & Company, as their agents, to deliver it. *The letter which Goldman, Sachs & Company sent with the draft simply amounted to an explanation to the persons to whose order it was drawn, that it was to be placed in the account of the petitioners.* This they did as the agents of the petitioners. *The legal effect of the transaction was the same as though the petitioners had themselves deposited the check "for our account" with the bankrupts on June 15th and the latter had at once credited it to the petitioners,* and then on the same day transferred the title to the check to the American Exchange National Bank, which on the same day credited it in the bankrupts' account" (fols. 252 and 253).

In the case at bar, the District Court held that:

> "In respect to the last two checks, it is true that 'for account of' ordinarily means for collection and that *an agency may be indicated by a letter of instruction or by a notation as well as by the restrictive endorsement. Boone County National Bank* v. *Latimer,* 67 Fed., 27" (fol. 117).

The holding of the District Court herein and in the *Latimer* case, *supra,* is in accordance with numerous decisions of the State courts of the last resort throughout the United States.

It has long been established that the intention of the parties delivering a negotiable instrument, to part or not to part with title to it, may be evidenced by an oral agreement, or an understanding to that effect.

> *Matter of Marine,* 169 A. D., 65, 67;
> *Turney* v. *Guthrie,* 15 N. Y. Sup., 679, 680;
> *Barker* v. *Prentice,* 6 Mass., 430, 433, 434;
> *German Fire Insurance Co.* v. *Kimble,* 66 Mo. App., 370, 371, 373.

With still greater force, the above rule applies to the case of *written* instructions accompanying negotiable instruments bearing no restrictive indorsements on their face. The following authorities uniformly support the rule of law, that memoranda accompanying negotiable instruments should be construed together and form a part of one and the same contract, evidenced by the negotiable instrument itself and the memorandum accompanying it:

> "Sec. 208. *Instructions accompanying a deposit and coming from the proper authority, must be carefully attended to.* When the depositor orders his money to be put on one of his accounts, or to be applied to

take up a particular check or note, or to be transmitted to a certain person, or *whatever special direction he may give, the bank must obey if it receives the deposit at all.*"

Morse on Banks & Banking (5th ed.), p. 409.

"*It is true that the paper came to the plaintiff's hands by general indorsement from Ives & Son, but the indorsement and the letter of advice in transmission must be read together, and so reading them the legal effect was to make the indorsement restrictive and the same in character as if the contents of the letter had been incorporated in the indorsement.* It follows, therefore, that upon the facts found, and as to which there was little if any dispute, the plaintiff never acquired title to the bill. It was an agent merely for its collection. It was only in that character that Ives & Son received the paper from the drawer, and that was the only title that was conferred upon the plaintiff."

Bank of America v. *Waydell,* 187 N. Y., 115, 120.

"While the deposit of a bill or check in the ordinary course of business, the depositor receiving a credit against which he can draw, has the effect of transferring the title (*Briggs* v. *Central Nat. Bank of N. Y.,* 89 N. Y., 182; *Metropolitan Nat. Bank* v. *Lloyd,* 90 id., 530; *Cragie* v. *Hadley,* 99 id., 131). I do not think that was the effect of the original deposit involved in this case. *The words on the deposit slip must be read into the contract.*"

King v. *Bowling Green Trust Co.,* 145 A. D., 398-401.

"A part of this lumber was sold, and a draft was drawn in payment of the same, which draft was indorsed by Cochran & Co., to plaintiff, Long, and for-

warded to him at Chicago, Ill., who, by letter, sent the same to the Bank of Commerce for collection, inclosed in the following letter: 'Chicago, July 24, 1926. Bank of Commerce, Louisville: Please find John L. Cochran & Co. check on your bank for $500, which please place to my credit; also J. L. Cochran & Co. draft, 30 days, after date July 5th, on Rodgers & Co., Peoria, Ill., for $309.81, which please collect and credit. Very truly yours, Jno. S. Long.' * * * We cannot concur with this reasoning of the Judge of a lower court, and, upon carefully examining the evidence in whole case, we fail to find sufficient evidence to support the judgment, and are of opinion that the court erred in refusing appellant a new trial."

Long v. *Bank of Commerce,* 38 S. W., 886, 887.

"The instruction which accompanied the draft when received by the bank was as follows: 'Inclosed herein please find our draft *for collection,* which we have made on the San Antonio Banking Association of your city. Kindly give this your immediate attention, and oblige, yours truly, Townsend, Hostetter & Co.' * * * *There is nothing from which could be implied an authority for the bank to hold the money, and treat it as a deposit."*

Hunt v. *Townsend,* 26 S. W., 310, 311.

"The draft on Erwin & Co., with bill of lading attached, sent to the Shapard Bank for collection by the Bank of Commerce, *was coupled with instructions* from the latter bank for specific application of the proceeds of the draft where collected. *These specific instructions took the particular transaction without the ordinary course between corresponding banks, in which the relation of creditor and debtor, or general depositor, would result* * * *."

Hutchinson v. *National Bank of Commerce,* 145 Ala., 196, 201.

Finally, the transaction in the case at bar took place entirely within the State of New York. It must be deemed to be covered by the law of New York concerning negotiable instruments. Section 35, of the New York Negotiable Instruments Law, provides as follows:

> "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. * * * the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, *and not for the purpose of transferring the property in the instrument.*"

POINT TWO.

The Circuit Court of Appeals erred in disregarding the settled legal and technical meaning of the expression "for account of" used in the memorandum accompanying the check for $15,000, particularly as there was no evidence whatsoever to show that the parties to the transaction intended to use the expression in any other sense.

The record in the case at bar is barren of any fact showing what was the intention of the parties concerned with the drawing and the delivery of said check for $15,000, apart from the intention implied by the technical and legal meaning of said expression, "for account of."

The Circuit Court of Appeals held in the case herein, and in the case of *Rochling Brothers* against the same bankrupt, decided in the same term as the case at bar, that such words imposed a restriction upon the negotiability of the negotiable instrument and that upon its de-

livery by the customer to his bank, the relationship established was not that of debtor and creditor, but of principal and agent. In the *Rochling* case, the Circuit Court of Appeals said:

> "This case presents exactly the same situation, with a single exception to be noted, as existed in respect of the second check in In re Gubelman, Ex parte Latzko & Popper, decided by this court on December seventh, 1925. There the cheque read, 'Pay to the order of Knauth, Nachod and Kuhne, Favor of M. Latzko & Popper.' Here one cheque read, 'for account of Rochling Bank' and the other a/c Gobt. Rochling.' We held that 'Favor of' was equivalent to 'collect for,' and it seems to us even plainer that 'for account of' is as broad. Indeed this was the form of cheque in *White* v. *National Bank,* 102 U. S., 658. If the drawer chooses to make the payee a fiduciary, he establishes that relation when the payee accepts it, at least until the beneficiary repudiates it, or unless his arrangements with the payee forbid. There can be no question that the drawer has limited the payees from disposal of the cheque in the interest of another, and that is enough."

This holding of the Circuit Court of Appeals is in entire accord with the decision of this court in *White* v. *Miners National Bank* (102 U. S., 658), where this court said:

> "Because of the words 'for account of Miners' National Bank of Georgetown, Colorado,' in this indorsement by Brownell, as president of the bank, the Circuit Court ruled that no obligation arose out of the transaction on the part of the bank to pay the draft or return the money, although due demand of the acceptor and refusal to pay was proved, with notice to the bank. *And this is the principal question which we are to decide.* * * *

> The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make Mr. White the agent of the bank for the collection of the money."

The check for $15,000 was drawn by Goldman, Sachs & Company, private bankers, upon instruction of Julius Baer & Company, also bankers, at Zurich, Switzerland; was delivered to the bankrupts, another private banking house in New York, for the benefit of the petitioners, private bankers of Budapest, Hungary. In other words, we have a case of a banking transaction between the bankers who *must* be presumed to use banking terms in the sense usually attributed to them by the banking usage and law. It is a case of experts in their particular line of business, employing technical nomenclature in regard to a technical transaction in their branch of business. It is submitted that the law is well settled that in such case, the court must apply the settled technical and legal meaning of the expression "for account of" to said words, as used by Goldman, Sachs & Company in their memorandum, sent by them to the bankrupts with the said check for $15,000.

Even if the trustee-appellee would have attempted to introduce any evidence upon the hearing before the Special Master, the evidence would have been rejected. In *White* v. *Miners National Bank, supra,* this court said in regard to the expression "for account of":

"If this be a sound view of the legal effect of the written indorsement, *neither parol proof nor custom can be received to contradict it.*"

In New York the rule is similar:

"Independent of other objections to the evidence offered, to show the meaning of the words 'free from average,' it is sufficient to say that *evidence of such a character is not admissible, for the purpose of attaching to those words, when forming part of a written contract, a meaning in conflict with, or variant from that given to them by adjudged cases;* by which their meaning, in precisely such contracts has been determined and was a point in judgment."

Bargett v. *Orient Mutual Insurance Co.*, 3 Bos., 385, 397.

And in *Shore* v. *Wilson*, Clark & Fin., 355, the House of Lords said at page 514:

"But, subject to these qualifications, *wherever the words employed bear a definite known meaning, and are capable of being applied according to their plain and ordinary meaning, no evidence is, in my opinion, admissible to show that the party intended to use them in a more extended or in a more qualified sense;* for, otherwise, every man's will and intention, however expressed, would be liable to be defeated. * * *"

In support of our contention that the expression "for account of" in the memorandum accompanying said check for $15,000, should be construed in accordance with its settled legal and technical meaning, the following authorities are relied upon:

"But if no such intention to use the words in any particular or extraordinary sense appears upon the

face of the writing, it then becomes the duty of the court to construe the words according to their plain, general, ordinary meaning, subject to certain qualifications. *First, if the words used be technical terms of law, the court must take them according to their strict legal acceptation, although in general and ordinary use they may have acquired a more extensive or a more limited sense."*

Shore v. *Wilson,* 9 Clark & Fin., 355.

"It may be further laid down as equally well settled, that if parties in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense."

Findley's Executors v. *Findley,* 11 Gratt. (Va.), 438.

"If it is a word of a technical or legal character it must be construed according to its technical or legal meaning."

Holt & Co. v. *Collyer,* 16 L. R. Chan. Div., 718, 720.

"This being a written contract between two parties, the construction of it belongs to the court; and the court must adopt the usual rules, and construe the provisos or conditions, as well as the other parts of the instrument, according to the ordinary meaning of the language used; *except that terms of art, or technical words, must be understood in their proper sense,* unless the content controls or alters their meaning."

Clift v. *Schwabe,* 3 C. B., 457, 470.

"So, also, if it appears that the term used has an established meaning among those engaged in the business to which the contract has reference, and unless

it be given that meaning, is indefinite and equivocal, *it should be treated, in interpreting the contract, as used according to that understanding* * * *."

Metropolitan Exhibition Co. v. *Ewing*, 42 Fed., 198, 202.

"There are words in deeds as in notes and other instruments which have a technical meaning, and are construed accordingly, but language in deeds or notes, or other instruments, not technical, must be taken in its ordinary and usual sense."

Bradshaw v. *Bradbury*, 64 Mo., 334, 336, 337.

"The rule is well settled that, in ascertaining the meaning of words in a deed or other written instrument, *technical words must be given their technical meaning and signification. Mitchell* v. *Mitchell*, 2 Gill., 238."

Maryland Coal Co. v. *Cumberland & Pa. R. R. Co.*, 41 Md., 343, 352.

POINT THREE.

The expression "for account of" when used in respect to negotiable instrument, is equivalent to "for collection" and establishes between the bank and its depositor the relationship of agent and principal and not of creditor and debtor.

We have cited under the previous point, the case of *White* v. *Miners' National Bank*, 102 U. S., 658, in which this court held that the expression "for account of" restricts negotiability of an instrument in reference to which it is used and prevents the passing of the title to the bank in regard to such instrument, upon the delivery of the same by the depositor to the bank.

The appellee in the brief and petition submitted simultaneously with this petition to this court in the case of Rochling Brothers, contends that the opinion of this court in the *White* case, in so far as it discussed the interpretation of the expression "for account of" was merely a *dictum*. Casual examination of the opinion in this court of the *White* case suffices to refute any such implication. There this court expressly said at page 660:

> "Because of the words 'for account of Miners' National Bank of Georgetown, Colorado,' in this indorsement by Brownell, as president of the bank, the Circuit Court ruled that no obligation arose out of the transaction on the part of the bank to pay the draft or return the money, although due demand of the acceptor and refusal to pay was proved, with notice to the bank. *And this is the principal question which we are to decide.* * * *"

For over half a century, the *White* case has been an authority for the proposition stated by us *supra*. It has never been doubted, distinguished or overruled. It has been repeatedly relied on by this court in its later decisions and by the highest appellate courts in many states as authority upon the question of restrictive indorsement.

Thus, in *Commercial National Bank* v. *Armstrong*, 148 U. S., 57, this court said:

> "And in *White* v. *Miners' National Bank of Georgetown*, 102 U. S., 658, where an indorsement was 'for account,' the same justice, speaking of the indorsement, said:
>
> 'It does not purport to transfer the title of the paper or the ownership of the money when received.'
>
> The plaintiff then, as principal, could unquestionably have controlled the paper at any time before its payment and this control extended to such time as the money was received by its agent, the Fidelity."

Again, in *Old National Bank of Evansville* v. *German-American National Bank of Peoria,* 155 U. S., 556, 562, this court cited the *White* case as authority on the question of restrictive indorsements.

In *Bank of Metropolis* v. *First National Bank,* 19 Fed., 301, Wallace, J., after referring to indorsement 'for collection' said:

> "In *First National Bank* v. *Pennsylvania Co. Bank,* 3 Fed. Rep., 257, paper was indorsed 'pay to the order of Hetherington & Co. on account of First National Bank, Chicago,' and it was held to be such a restrictive indorsement as to charge subsequent holders with notice that the indorser had not transferred title to the paper, or its proceeds. Under either form of indorsement the natural and reasonable implication to all persons dealing with the papers seems to be that the owner has authorized the indorsee to collect it for the owner, and conferred upon him a qualified title for this purpose and for no other. Other authorities in support of this conclusion are: *Sweeney* v. *Easter,* 1 Wall., 167; *White* v. *Nat. Bank,* 102 U. S., 658; *Lee* v. *Chillicothe Bank,* 1 Bond., 389; *Blaine* v. *Bourne,* 11 R. I., 119; *Claffin* v. *Wilson,* 57 Iowa, 15."

As late as 1925 Wolverton, J., in *Myassa-Arcadia Drainage District* v. *First Natl. Bank,* 3 Fed. (2nd), 648, cited the *White* case in its customary meaning:

> "Nor does the indorsement 'for account' purport to transfer the title of the plaintiff or the ownership of the money when received. *White* v. *National Bank.*"

In *Tyson* v. *Western Nat. Bank,* 25 Atl., 520, 521, the Court of Appeals of Maryland relied on the *White* case in its conventional sense.

"In the present case the check and draft were deposited with Nicholson & Sons with an indorsement in these words: 'For collection for account of Tyson & Rawls.' This indorsement was not adequate to pass to Nicholson & Sons the title to these papers. It has been so held by this court, and the Supreme Court of the United States and other courts * * *.

In *White* v. *Bank*, 102 U. S., 658, it was said: 'The plain meaning of it (the indorsement) is that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser."

In *Freiberg* v. *Stoddard*, 28 Atl., IIII, the Supreme Court of Pennsylvania considered the *White* case as holding that "for account of" implied restriction on the negotiability of an instrument:

"An indorsement for collection is restrictive, and carries no power of sale with it. In such case, the indorsee is a mere agent for an indorser and such indorsement has been said not to amount to a transfer of title. So an indorsement 'for collection for my account,' or 'for account of it,' is restrictive and does not pass the title, or the right to proceeds, of the instrument. The indorsee takes the instrument as agent or the trustee for the indorser; and if he disposes of it for his own use, the indorser may recover from the purchaser the amount collected on it, or he may recover the bill itself in an action of trover. By such restrictive indorsement the increase takes the instrument, subject to the trust created. *Rand Com. Paper*, Par. 726; *Daniel Neg. Inst.*, Par. 698; *White* v. *Bank*,

102 U. S., 658; *Sweeny* v. *Easter*, 1 Wall., 166; *Bank* v. *Gregg*, 79 Pa. St., 384; *Hackett* v. *Reynolds*, 114 Pa. St., 328."

In *U. S. National Bank* v. *Geer*, 55 Neb., 462, 464, 465, the highest court of Nebraska said:

> "In *First National Bank of Chicago* v. *Reno County Bank*, 3 Fed. Rep., 257, it was distinctly decided that an endorsement of a bill of exchange directing the drawee to pay to another 'on account of the endorser,' or 'for collection' is a restrictive endorsement carrying with it notice that the endorser did not thereby part with title to the paper or to its proceeds when collected. To the same effect are *Beal* v. *City of Somerville*, 50 Fed. Rep., 647; *Sweeney* v. *Easter*, 68 U. S., 166; *Balbach* v. *Breylinghuysen*, 15 Fed. Rep., 675; * * * *White* v. *Miners' Nat. Bank*, 102 U. S., 658."

There are numerous authorities preceding the decision of the United States Supreme Court in the *White* case, uniformly holding that words "for account of" restrict the negotiability of commercial paper.

Thus in *Treuttell* v. *Barandon*, 8 Taut., 100, the court held that an indorsement "pay to J. or order for account of N." constituted a restrictive indorsement. The court remarked that such indorsement has been known to commerce and law for many years and has always been considered as implying restriction of negotiability.

In *Lee* v. *Chillicothe Branch of State Bank*, 15 Fed. Cas. (Nos. 8186, 8187) 150, 151, 152, both the District and the Circuit Courts discussed at length various restrictive indorsements, including words "for account of" and stated that:

> "It imports that indorsee receives the bill for a special purpose, and as a trustee for the party in-

dorsing; and is equivalent to direct notice to every customer to whom it may be afterwards presented, that he has no right to dispose as his own property."

In *First Nat. Bank* v. *Lynn*, 132 Mass., 227, 228, the deposit was: "for account of First National Bank of Lynn, Mass." The court said:

"The words 'for account of' merely indicate the relations which the two banks hold to each other in the transaction. At the most, they show that the note was indorsed to the bank in Boston, not upon a valuable consideration, but for collection."

In *Hackett* v. *Reynolds*, 114 Pa., 328, the indorsement was "Pay S. H. Lamberton, Cashier, or order, for account, Penn Bank, Pittsburgh. G. L. Reiber, Cashier," and the court said of Reynolds, Lamerton & Co., that

"They had an undoubted right to treat the Penn Bank as the actual owner of the note."

In *Leary* v. *Blanchard*, 48 Me., 269, the deposit was "for account of the Atlas Mutual Insurance Co." The court stated at page 274:

"The indorsement, by its terms, was restricted, and the ordinary and popular sense cannot be changed by parol evidence. 1 Greel. Ev., Par. 295."

In *First Nat. Bank of Belmont* v. *First Nat. Bank of Barnesville*, 58 Oh. St., 207, the court said:

"• • • when, the indorsement is 'for collection' or 'for account of' it is notice to the drawee bank that the bank presenting the check for payment is not the owner but only the agent of the owner, and that the money is to be remitted to the owner, back through

the same channel through which the check or bill was received by the collecting bank."

In *First National Bank of Chicago* v. *Reno County Bank,* 3 Fed. Rep., 257, the court said, at page 261:

> "July 29, 1878. Pay to the order of W. Hetherington & Co., Atchison. Account of First National Bank, Chicago. L. J. Cage, Cashier."
>
> "This was clearly a restrictive indorsement, the effect of which was to restrict the further negotiability of the bills and to give notice to the defendant that the plaintiff did not thereby give title to them, or to their proceeds, when collected. 1 Daniell on Negotiable Instruments, Par. 698, and cases cited."

The result of the above doctrine, under which it was consistently held that the expression "acount of" restricts the negotiability of commercial paper and are equivalent to the expression "for collection," is best described by the court in *First National Bank of Belmont* v. *First National Bank of Barnesville, supra,* at page 214 (decided in 1898):

> "Some years ago the practice of indorsing checks 'for collection' or 'for account of,' had become almost universal, and when it was decided in the above cases of *National Park Bank of New York* v. *Seaboard Bank,* 114 N. Y., 28 and *Northwestern National Bank of Chicago* v. *Bank of Commerce of Kansas City,* 107 Mo., 402, that the drawee bank could not recover back the money, in the one case from the collecting bank, nor in the other from the bank owning the draft, it startled the banks located in large cities and awakened them to the dangers attending the payment of such drafts or bills, and the result was that in the year 1896, the clearing house in the City of New York

> adopted a rule to the effect that its members should not send through the exchanges any paper having any qualified or restrictive indorsements such as 'for collection' or 'for account,' unless all indorsements were guaranteed by the bank sending such paper. This action was soon followed by the clearing houses in other cities and in some of them all indorsements are required to be either in blank, or 'pay to * * * or order.' By this action of the clearing houses, indorsements 'for collection,' or, 'for account of,' have fallen into disuse, and the banking business of the country is now done, almost univorsally, upon unrestricted indorsement."

The Circuit Court of Appeals, in disregarding the settled meaning of the expression "for account of," based its decision as to the check for $15,000 upon the assumption that:

> "The legal effect of the transaction was the same as though the petitioners by themselves deposited the check 'for our account' with the bankrupts on June 15th * * *" (fol. 252).

It is respectfully submitted that even if petitioners themselves had deposited said check for $15,000, drawn as it was upon the Bank of America, and instructed the bankrupts that it was deposited "for our account," such deposit would have constituted the bankrupts mere agents for the collection of the proceeds of said check. It is only *after the collection* of said check by the bankrupts, that a relationship of debtor and creditor would have arisen between the bankrupts and petitioners by reason that the petitioners had a current checking account with the bankrupts.

American National Bank v. *Miller*, 229 U. S., 517, 520;

In re Jarmulowsky, 249 Fed., 319, 320, 321, 322;
In re Havens,' 2 Bened., 309, 310, 311;
Levi v. *National Bank of Missouri,* 5 Dill., 104, 106, 109;
Manufacturers National Bank v. *Continental Bank,* 148 Mass., 553, 558, 559;
First Nat. Bank of Crown Point v. *First Nat. Bank of Richmond,* 76 Ind., 561, 569, 570;
Morse on Banks & Banking (5 Ed.), Sec. 567.

The indorsement or a direction by a depositor to his bank that a deposit of negotiable instrument is "for his account," restricts the negotiability of that instrument. The question simply is this: Who is the beneficial owner of the proceeds of the check? Clearly the depositor, because he desires this particular instrument to be collected for *his* account and not *for the account of his bank,* i. e., for the benefit of himself and not for the benefit of the bank. So long as the bank is not collecting a negotiable instrument for its own benefit, it certainly has no title to it or to the proceeds thereof.

In *Lee* v. *Chillicothe Branch Bank* (#8186), 15 Fed. Cas., the District Court said, at pages 150-151:

> "Without stopping to analyze the many cases referred to, in which indorsements have been held to be restrictive in their character, as suspending the further negotiability of commercial paper, the following instances may be briefly stated: 'pay to *my* use,' 'pay the money to my servant *for my use,'* * * *."

On appeal the Circuit Court said (No. 8187; 15 Fed. Cas.), at page 152:

> "Whether an endorsement be restrictive or not, depends upon the intention of the parties as expressed: 'pay to A *for my account';* 'pay the contents *to my*

use'; 'pay the money to my servant *for my use'*; these are specimens from cases where the endorsements have been held restrictive. More might be added, but the above are sufficient, and they all rest upon the principle that from the nature of the restriction, the negotiability of the bill ceases. * * *"

Section 66 of the New York Negotiable Instruments Law provides:

> "An indorsement is restrictive, which either: (3) Vest the title in the indorsee in trust for *or to the use of some other person.*"

And it has been repeatedly held that the word "indorsement" as used in the law of negotiable instruments, means not only inscription of the instrument itself but also any writing accompanying it.

> *Goetz* v. *Bank of Kansas City,* 119 U. S., 551;
> *Bank of America* v. *Waydell,* 187 N. Y., 115, 120.

POINT FOUR.

The Circuit Court of Appeals erred in holding that where a negotiable instrument indorsed in blank is delivered by the depositor to his bank with specific instructions in regard thereto, and the bank deposits said negotiable instrument with another bank but omits to forward said instructions, the depositor is thereby divested of title to said instrument.

The Circuit Court of Appeals in its opinion in the case at bar stated (fols. 252 and 253):

> "The legal effect of the transaction was the same as though the petitioners had themselves deposited

> the check 'for our account' with the bankrupts on June 15th and the latter had at once credited it to the petitioners, and then on the same day transferred the title to the check to the American Exchange National Bank, which on the same day credited it in the bankrupts' account. *That transaction made the American Exchange National Bank the owner of the check on June 15 and the proceeds when collected on June 16th belonged not to the petitioners or to the bankrupts but to the bank which was the owner of the check when it was collected.* We think the transaction is governed by the rule laid down in the *Burton* case, and that the relation between the petitioners and the bankrupts on June 15, when this check was credited by the latter to the former, was that of creditor and debtor, and that the proceeds of this check when it was collected on June 16th did not belong to these petitioners * * *."

It is clear from the facts herein that petitioners completely traced the proceeds of the said check for $15,000 to the securities of the bankrupts returned by the American Exchange National Bank to the trustee for the bankrupts. Hence no question arises as to any equities on the part of the American Exchange National Bank to the proceeds of said check for $15,000. It therefore follows that the American Exchange National Bank was merely a gratuitous holder of said proceeds of said check for $15,000 without having parted with any consideration past or present therefor.

The doctrine that the Circuit Court of Appeals intended to apply to the case at bar is unsound and has been so held by the same Circuit Court and other State and Federal courts.

A deposit accompanied by instruments establishing between the depositor and his bank the relationship of principal and agent, thereby creates a confidential relationship

between them, and the proceeds of such deposit are trust moneys, the title to which remains in the depositor so long as he is able to trace the same.

That when there is a relationship of principal and agent between the depositor and the bank, the proceeds of negotiable instruments received by the agent are deemed to be held by the agent *in trust* for the principal, was held by this court in *Central National Bank of Baltimore* v. *Connecticut Mutual Life Insurance Co.*, 104 U. S., 54, where the opinion reads as follows at pp. 70 and 71:

> *"The relation of Dillon to the Insurance Company was one of confidence and trust. He was its agent for the collection of premiums,* which belonged to it no less when in his hands than before their receipt by him. He was to account for them, under its directions, and in his entire dealing with them was bound to obey its orders. He was not merely its debtor for the amount in his hands. He held the fund for the use and as the property of the Company. *Foley* v. *Hill,* 2 H. L. Cas., 28."

And in the same case this court, citing from *Pennell* v. *Defell,* 4 De Gex. M. & G., 372, said at page 67:

> "In the same case, Lord Justice Knight Bruce said: page 383: 'When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done, had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the cestuis que trust, it must be deemed specifically theirs, as between

the trustee and his executors, and the general creditors after his death on one hand, and the trust on the other.' He added: 'This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee or owing also to him, money in every sense his own.'"

In *Van Alen* v. *American National Bank*, 52 N. Y., 1, 4, the court said:

"This action is based upon another principle equally well settled, viz., that so long as money or property belonging to the principal or the proceeds thereof may be traced and distinguished in the hands of the *agent or his representatives or assignees*, the principal is entitled to recover it unless it has been transferred for value wihout notice (2 Gratt., 544; *Pennell* v. *Deffell*, 4 De Gex. M. & G., 372; 6 Jones Eq., 34: H. & M., 417; 2 Kent Com., 796, 801). It appears to me clear that Van Alen & Rice were the agents of the plaintiff to sell the bonds, and were bound to keep the proceeds of the same for him. He owned the bonds, directed their sale, and also directed that the proceeds should be kept for him in a particular manner, and he was notified by Van Alen & Rice that they had been sold and the avails placed and would be kept as directed. These undisputed facts establish the relation of trustee and *cestui que trust* between the plaintiff and Van Alen & Rice as to the proceeds of these bonds."

In *Roca* v. *Byrne*, 145 N. Y., 182, 187, the court said:

"It is undoubtedly true that the relation of debtor and creditor existed, according as the state of the account showed the balance to be one way or the other; but that fact was not inconsistent with, and

could not affect, the fact that the relation was also of a fiduciary character. *Byrne received all drafts in virtue of his agency and they, or the proceeds, were received for the purposes connected with that agency.* * * * *The legal title to the moneys may have been in him; but the right, in equity, to follow them, as the proceeds of their drafts, was in the plaintiffs. If Byrne, or his representatives, placed the moneys in the bank to the credit of his account, that would not affect the question as to whom they belonged beneficially; a question which equity, in a proper case, will always inquire into.* If received, as here, in the course of transactions between the principal and the agent, the character of the moneys would be unchanged by the deposit; provided they could be identified. They would still be moneys held for the principal."

To the same effect are the following authorities:

"It is undeniable that equity will follow a fund through any number of transmutations and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee, or agent into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership. It is conceded, for the cases abundantly show it, that when the bank received the deposit it thereby became a debtor to the depositor. The debt might have been paid in answer to his claims and thus the liability have been extinguished. * * * But surely it cannot be maintained that when the principals asserted their right to the money * * * his right to reclaim it had not ceased. *A bank can be in no better situation than any other debtor.* * * *

"In *Frazier* v. *The Erie Bank*, 8 W. & S., 18, it was ruled that if an agent procure the note of his princi-

pal to be discounted and deposit the proceeds in bank to his own credit, the principal may maintain an action therefor against the bank in his own name, and this though the bank had no notice when the deposit was made that the money deposited did not belong to the agent."

Farmers & Mechanics' Nat. Bank v. *King*, 57 Pa., 202, 205, by Mr. Justice Strong, subsequently a member of this court.

"The plaintiff, being the holder of a negotiable *note indorsed in blank*, delivered it, without putting, his name on it, to an agent to procure it to be discounted. *The agent indorsed it in his own name, and sent it to a bank, and the messenger represented that the money was wanted for the accommodation of the agent.* The bank discounted the note and passed the proceeds to the credit of the agent, and the same were then attached as his property, in the possession of the bank, on a trustee process. The plaintiff forthwith informed the bank that the note belonged to him and demanded payment of the proceeds. Held, that the bank was responsible to him therefor."

Headnote in *Merrill* v. *Bank of Norfolk*, 19 Pick., 32;

"*The draft* on Erwin & Co., with bill of lading attached, sent to the Shapard Bank for collection by the Bank of Commerce *was coupled with instructions from the latter bank for specific application of the proceeds of the draft when collected. These specific instructions took the particular transaction without the ordinary course between corresponding banks, in which the relation of creditor and debtor, or general depositor would result; and the collecting bank could not without the consent of the initial bank and in violation of the latter's instructions, alter or change*

the relation so created by any subsequent conduct or action of its own in dealing with the proceeds of the draft when collected. * * *

In the case at bar, it is shown that Erwin & Co. paid the draft of the Bank of Commerce by their draft on Schuessler & Sons, which was sent by the Shapard Bank to the Bank of Lafayette. The last named bank collected the money from Schuessler and Sons, which it afterwards paid to the assignees of the Shapard Bank. *So the fund in question is traced directly into the hands of the assignees, and was accompanied with the trust character with which it was originally impressed."*

Hutchinson v. *National Bank of Commerce,* 41 So., 143, 144.

"Beneficiaries who do not receive from their trustee *or agent* what he ought to pay them may either bring an action, with or without an attachment of property, taking the position of an ordinary creditor, or they may seem to enforce their rights by such equitable remedies as are available to them. And while the defaulter remains solvent, so that he can be compelled to meet all his obligations, legal or equitable, there may be not difficulty in allowing them to proceed simultaneously in both ways. But upon the bankruptcy of their debtor or defaulter the case becomes different. If they appropriate to themselves a fund which they can reach upon the equitable doctrine that we have stated, they thereby assume a different position from that of ordinary creditors of a common debtor; they assert rights superior to those of ordinary creditors; and by the enforcement of those rights they diminish the fund to which those creditors must look for a dividend."

Hewitt v. *Hayes,* 205 Mass., 356, 363.

The principle of the above cases has been invariably applied to banking transactions and constitutes an integral part of the banking law of this country.

> *"Instructions. If the customer gives any instructions or directions* concerning any item in the method which is to be pursued in collecting or protesting the paper, *the bank receiving the paper is bound to forward such instructions and directions to its agent or correspondent."*
>
> *Morse on Banks & Banking* (5th Ed.), page 458.

The Circuit Court of Appeals for the Second Circuit applied this doctrine in the case *In re Berry,* 147 Fed., 208, 210, 211, where it said:

> "Stripped of all complications and entanglements we have this naked fact that Raborg and Manice by mistake paid Berry & Co. $1,500 which they did not owe and which Berry & Co. could not have retained without losing the respect of every honorable business man. * * *
>
> It is unnecessary to enter further into details of the bank's transactions subsequent to the failure; it is enough to say that as the final result of the bank's liquidation of the account of $6,310.41 was delivered to the trustees in bankruptcy. But for the mistake of Raborg & Manice this sum would have been $4,810.31 which is all the bankrupts' creditors are entitled to. The $1,500 should be paid by the trustees to Raborg & Manice, its lawful owners."

In the case at bar the Circuit Court of Appeals held in regard to the check for $15,000.00:

> "The proceeds when collected on June 16, belonged not to * * * the bankrupts, but to the bank which

was the owner of the check when it was collected" (fol. 253).

In the *Berry* case, *supra,* the same court held that the bankrupts had no title to the proceeds of a check deposited by them to their current checking account with their bank prior to the filing to the petition in bankruptcy. It did not hold in the *Berry* case that the bank of the bankrupts acquired title to said proceeds as it did in the case at bar.

Similarly, in *Titlow* v. *McCormick,* 236 Fed., 209, the bankrupt bank received for collection certain school district warrants, which it collected through *three* different correspondent bank. At the time of the bankruptcy, it had a credit balance with *one* of these banks. The Circuit Court of Appeals for the Ninth Circuit said at page 215:

> "The record does show, however, that such deposit of the United States National Bank of Centralia with the Bank of California of Tacoma was not entirely dissipated, but there remained of such deposit at the time of the suspension of the former the sum of $1,585.36, which passed into the hands of the receiver of its assets, and to which only the appellee is, in our opinion, entitled to a preference over the general creditors of the insolvent bank."

To the same effect is *In re Royea's Estate,* 143 Fed., 182, where the court said at pages 183, 184:

> "It appears from the record that at the time of adjudication the bankrupt had on deposit in a bank $390.70, which has since come into possession of the trustee of his estate. The deposit included $120, which the petitioner had theretofore intrusted to the bankrupt for safe keeping. * * * The bankrupt did not keep the money separately, but made a deposit thereof

in a bank in which he had other money on deposit, so that it became mingled with other money held by the bank subject to his check, and the balance to his credit exceeded the amount received from the petitioner, at all times continuously from the date of the deposit until it was withdrawn by the trustee, who now has it in custody. * * * In this case, although the money cannot be specifically identified, the fund is clearly proved to have been enlarged by mingling trust money with other money, and the equitable right of the petitioner to reclaim the amount equivalent to the amount intrusted is clear. *San Diego County* v. *Cal. Nat. Bank*, 52 Fed., 59; *Massey* v. *Fisher*, 62 Fed., 958; *City of Spokane* v. *First Nat. Bank*, 68 Fed., 982; *Bradenburg on Bankruptcy* (3d Ed.), page 768."

Still better illustrations of the principle, that the depositor's bank cannot change the nature of the deposit by mere failure to transmit to the collecting bank specific instructions given to it by its depositor are the three following cases:

In *Drovers' Nat. Bank* v. *O'Hare*, 119 Ill., 646, customers of the Drovers' Bank made a deposit stating that it was for the credit of Henry Bank "for the use of M. J. O'Hare." The Drovers' Bank sent a check for the account of said deposit to the Northwestern National Bank, stating that the said amount was for the credit of Henry Bank but omitting to mention O'Hare's interest. The Henry Bank failed, before O'Hare was paid, and the Northwestern Bank applied the amount of the check of the Drovers' Bank to wipe out the indebtedness of the Henry Bank to it.

The court said:

"But if the Henry Bank must, from the character given the funds in the hands of the appellant, account

to the appellee therefor, it was the duty of appellant to give notice to any intermediary it might select, of the trust character impressed upon the funds, and not permit it to be carried to the general account of the trustee, to be applied upon its debts (Perry on Trusts, 406, 443, 444, and authorities cited). • • •

In what is claimed as an attempt to transfer the funds to the Northwestern National Bank, appellant withheld all indications of the trust character of the funds, or that it was other than money going to the general account of Henry Bank. To this appellee in nowise consented, and appellant stands in no better position that if it had retained the money in its custody."

The above decision was followed in the *Union Stock Yards Nat. Bank* v. *Dumond*, 33 Ill. App., 102, where the check was deposited "for the use of George W. Dumond," and the court said at page 103:

"Here the fault of the Stock Yards Bank was in depositing the money of Dumond with the Merchants' National Bank, without preserving its identity in pursuance of instructions which were entirely plain. Having accepted the money with the instructions, it should have pursued the course marked for it."

Finally, in *Beaver Boards Co.* v. *Imbrie & Co.*, 282 Fed., 655, 656, the court held that:

"The check deposited with the broker here was accompanied by the express written stipulation: 'Which you will hold *for my account* against any purchases of stock on my order, same to be held by you until the account is closed.' • • • *Depositing the money in the general account of the broker did not alter its character as between Imbrie & Co. and Lynch. Central Nat. Bank* v. *Coun. Mutual Ins. Co.*, 104 U. S., 54."

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[43946]

APR 28 1927
WM. R. STANBURY
CLERK

Supreme Court of the United States

OCTOBER TERM—1926.

No. [redacted] 48

ALEXANDER LATZKO, ET AL.,

Petitioners,

against

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy, etc.,

Respondent.

N[redacted] 49

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy, etc.,

Petitioner,

against

ALEXANDER LATZKO, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR ALEXANDER LATZKO, et al.

CHARLES A. BRODEK,
BORRIS M. KOMAR,
Counsel for Petitioners in No. 337
and Respondents in No. 338.

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Supreme Court of the United States

OCTOBER TERM, 1926.

Nos. 337 and 338.

In the Matter

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,

Bankrupts.

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO and A. POPPER,

Petitioners-Respondents,

THE EQUITABLE TRUST COMPANY OF NEW YORK, as trustee in bankruptcy, etc.,

Respondent-Petitioner.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR ALEXANDER LATZKO, et al.

STATEMENT.

1. These appeals arose out of a reclamation proceeding by N. Latzko and A. Popper against

the above-named bankrupts. In No. 337, said firm appeals from so much of the decision of the United States Circuit Court of Appeals for the Second Circuit, made and entered December 14th, 1925 (R., 92), as affirmed the decree of the United States District Court of the Southern District of New York, made and entered February 20th, 1925 (R., 36, 37), as to a certain check for $15,000. No. 338 is a cross-appeal by the above-named trustee from so much of the said decision of the Circuit Court of Appeals as reversed the said decree of the District Court as to a certain check for $1,294. No appeal was taken by either party as to the decision of the Circuit Court of Appeals as to a certain check for $3,000.

2. The official report of the opinion delivered by the Circuit Court of Appeals is found in 10 Fed. (2nd), 1926 (R., 62-86).

3. The statute under which the jurisdiction of this court is invoked is the Act of February 13th, 1925, amending Section 240 (a) of the Judicial Code. The petitioners' writs of certiorari and briefs in support thereof were filed on April 12, 1926, and the orders granting the petitions were filed on April 26, 1926 (R., 95).

FACTS.

Petitioners in No. 337 (respondents in No. 338) are international bankers, under the firm name of N. Latzko and A. Popper, with a main office in the City of Budapest, Hungary, for whom the bankrupts Knauth, Nachod & Kuhne acted as New York correspondents (R., 4). For brevity the firm of N. Latzko and A. Popper is hereinafter referred to as "petitioners" and the trustee of the bankrupts is referred as "respondent."

Events Prior to Filing of Petition in Bankruptcy.

On June 15th, 1923, the National City Bank of New York delivered to Knauth, Nachod & Kuhne in New York City, its cashier's check for $1,294, payable only through the New York Clearing House, to the "order of Knauth, Nachod & Kuhne, New York, *favor N. Latzko & A. Popper, Budapest*" (R., 30). On the same day Goldman, Sachs & Co. delivered to Knauth, Nachod & Kuhne their check for $15,000 drawn on the Bank of America, and accompanied by a written memorandum stating:

> "We hand you herewith our check for Fifteen Thousand Dollars for *account of Latzkopper, Budapest*, by order of Julius Baer & Co., Zurich, as per cable, June 15, from same" (R., 30).

On the same day Knauth, Nachod & Kuhne credited the account of petitioners on their books with the amounts of said checks, endorsed the same to the order of the American Exchange National Bank, and delivered them to the latter for collection (R., 30, 32). The check for $15,000 was delivered by Knauth, Nachod & Kuhne to the American Exchange National Bank without said memorandum delivered to them by Goldman, Sachs & Co.

Bankruptcy of Knauth, Nachod & Kuhne.

At 10:30 P. M. on June 15th, 1923, an involuntary petition in bankruptcy was presented to Knox, D. J., and an order was signed by him appointing

a receiver. At 9:30 A. M. on June 16th, 1923, *before banking hours,* the petition in bankruptcy and the order appointing the receiver were filed with the Clerk of the United States District Court for the Southern District of New York (R., 5, 6). On the same day the receiver wrote to the American Exchange National Bank apprising it of his appointment and directing it to hold any funds of the bankrupt for his account (R., 32).

On the same day, *and during banking hours,* said two checks totalling $16,294 were collected by the American Exchange National Bank. No business was transacted by the bankrupts subsequent to June 15th, 1923, and the final balance of the current account of the bankrupts with the American Exchange National Bank was the sum of $212,127.86 in favor of the bankrupts (R. 51).

Course of Dealing Between Petitioners and Bankrupts.

Petitioners maintained a current checking account with the bankrupts. At the time of the deposit of said checks by said banks with the bankrupts for account of petitioners, petitioners had a credit balance with the bankrupts, amounting to several thousands of dollars and were not then and have not been at any time since then, indebted either to the bankrupts or to the receiver (R., 9, 22).

Petitioners did not treat evidences of debt deposited with the bankrupts for collection or otherwise, as a deposit of cash or as an immediate credit open to petitioners by the bankrupts, nor did petitioners draw upon the bankrupts against the deposit or deposits of such evidences of debt before the collection by the bankrupts of moneys due upon said evidences of debt (R., 6, 7).

The petitioners never drew upon the bankrupts against their account before the collection by the bankrupts of the moneys due upon any evidences of debt deposited by the petitioners to their account with the bankrupts (R., 22).

The petitioners had no agreement with the bankrupt to treat evidences of debt deposited with them for collection or otherwise as a deposit of cash, nor that an immediate credit should be given by the bankrupts to petitioners upon the receipt of such evidences of debt (R., 6). *All of the above facts are admitted by the respondent* (R., 21).

Tracing Proceeds of Petitioners' Checks Into Trustee's Hands.

At the time of the filing of the petition in bankruptcy, the bankrupts were indebted to the American Exchange National Bank for $250,000 (R., 52) secured by collateral consisting of bonds and stocks, which, taken at their then market value, greatly exceeded the amount of said loan (R., 10).

Between June 22nd, 1923, and July 12th, 1923, the American Exchange National Bank, pursuant to the orders of the receiver, sold part of said collateral and applied the proceeds thereof to the liquidation of said loan (R., 52, 54, 55, 56). On July 12th, 1923, the receiver instructed the American Exchange National Bank to apply the balance of said current checking account between it and the bankrupt, to-wit: $212,066.16, to the payment of the balance of said loan then amounting to $229,503, plus $1,140.99 interest thereon (R., 57).

On the same day the receiver delivered to the American Exchange National Bank his check for $18,851.83 in liquidation of the balance of said

loan, and in return therefor the American Exchange National Bank delivered to him the balance of the stocks and bonds held by it as a collateral for said loan (R., 57, 58, 59). Hence, the proceeds of petitioners' said checks first went into said balance of bankrupts' current checking account with the American Exchange National Bank, and then were used by the Receiver to redeem part of the bankrupt's collateral with the American Exchange National Bank, and went into the bonds and stocks delivered by said bank to the receiver on July 12th, 1923.

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held that petitioners were entitled to the proceeds of the check for $1,294, because the words "favor of" on the face of the check restricted its negotiability, and made both the bankrupts and the American Exchange National Bank mere agents of the petitioners for the collection of the same (R., 82, 83). It held that petitioners were not entitled to the proceeds of the check for $15,000 on the ground that in ascertaining title to negotiable instruments, the court merely looks to the form of the instrument itself and not to the writings or instructions accompanying the same, and upon the further ground that the bankrupts, by depositing said unrestricted check with the American Exchange National Bank prior to the bankruptcy, transferred the title to it to the American Exchange National Bank (R., 84, 85), although the latter bank gave nothing of value for it.

Distinguishing Features from the Rochling Case (No. 322).

The following additional questions of law are involved in this case and are not involved in the Rochling case:

(a) Whether written restrictive instructions accompanying checks endorsed generally and deposited by customer to his current checking account in a bank, restrict the negotiability thereof in the same manner as if said instructions were written on the checks themselves.

(b) Whether depositor's bank, in receiving negotiable instruments indorsed in blank from the depositor accompanied with specific instructions in regard thereto, and in failing to transmit said instructions to its correspondent bank when it delivers to it said negotiable instruments, thereby divests the title of the depositor to said negotiable instruments if said specific instructions restrict the negotiability of said instruments.

(c) Whether the act of the depositor's bank as described under (b) bears upon the title to the proceeds of said negotiable instruments in a contest between the depositor's bank and the depositor, in the case where the depositor's bank fails prior to the collection of said negotiable instruments, and the proceeds thereof are traced to a specific fund in receiver's hands.

The following material differences of fact exist in the records of these cross appeals and appeal No. 322.

(a) *All the checks in No. 322 (Rochling case) were cashier's checks,* while the check for $15,000 in the above appeals was *an ordinary uncertified check.*

(b) In appeal No. 322 Rochling Brothers desired *immediate financial credit* from the bankrupts on the day of the deposit of the checks, while the petitioners herein *never asked or expected* immediate credit for their checks prior to their collection.

(c) In appeal No. 322 Rochling Brothers *received interest* on their deposit from the bankrupts immediately upon making the same, while the petitioners herein *received nothing* on their deposits.

(d) It does not appear in the Rochling case that Rochling Brothers did not treat their deposits as a deposit of cash or as an immediate credit to them; nor did it appear that Rochling Brothers ever drew upon the bankrupts against their deposits before the collection by the bankrupts of negotiable instruments deposited with them by Rochling Brothers.

Errors Relied Upon by Petitioners.

Petitioners urge the following errors:

1. The Circuit Court of Appeals erred in holding that the title to said check for $15,000 was in the bankrupts prior to the filing of the petition in bankruptcy, and not in your petitioners.

2. The Circuit Court of Appeals erred in disregarding the admitted course of dealing between the petitioners and the bankrupts.

3. The Circuit Court of Appeals erred in holding that as between the bankrupts and your petitioners, the title of your petitioners to said check for $15,000 was divested by the delivery thereof by the bankrupts to the American Exchange National Bank and the crediting thereof by said bank to the account of the bankrupts prior to the filing of the petition in bankruptcy herein.

4. The Circuit Court of Appeals erred in holding that instructions contained in papers accompanying deposits of negotiable instrument do not constitute a part of the contract of deposit thereof between the bankrupts and your petitioners.

5. The Circuit Court of Appeals erred in disregarding the settled legal and technical meaning of the expression "for account of" used in the memorandum accompanying the check for $15,000.

6. The Circuit Court of Appeals erred in holding that the delivery of a negotiable instrument deposited by a customer with his bank, with specific instructions restricting its negotiability, to its correspondent bank, without transmitting said instructions, divests the depositor of title to said instruments and the proceeds thereof.

7. The Circuit Court of Appeals erred in holding that a trustee of the bankrupt has a better title to the proceeds of said check of $15,000 than the bankrupts would have had, because the same was deposited with and collected by the correspondent bank of the bankrupts, since the trustee stands not in the shoes of the American Exchange National Bank but in those of the bankrupts.

Summary of the Argument.

The argument herein consists of seven points. Point Seven, dealing with the tracing of the proceeds of the petitioners' checks herein, is not controverted.

The first four points discuss the application to the facts at bar of the decision of this court in *White* v. *Miners' National Bank,* 102 U. S., 658. Assuming that this court reaffirms the doctrine of the *White* case, there will be no necessity of considering the remaining two points.

Points Five and Six deal with the application of the decision of this court in *Burton* v. *United States*, 196 U. S., 283, to the checks herein involved and show that even if the doctrine of the *White* case is not applied, the petitioners are still entitled to recover the proceeds thereof from the trustee. The above points in detail are as follows:

1. The Circuit Court of Appeals correctly held that the settled legal and technical meaning of the expressions "favor of" and "account of" when used in connection with negotiable instruments implies restriction of their negotiability.

There is nothing in the record at bar that shows that the parties concerned intended to use said expressions in connection with the checks herein involved in any other sense.

2. *White* v. *Miners' National Bank* has been considered an authority for the proper meaning of the words "account of" for half a century, and is in accordance with earlier authorities.

Respondent's attempted distinctions of the doctrine in *White* case from the facts at bar were properly rejected by the Circuit Court of Appeals.

3. The Circuit Court of Appeals erred in holding that the memorandum accompanying the check for $15,000 and stating that the same was delivered to the bankrupts "for account of" petitioners, did not constitute a part of the contract controlling the title of the parties to said check.

4. The Circuit Court of Appeals erred in holding that where a negotiable instrument indorsed in blank is delivered by the depositor to his bank with restrictive instructions and the bank deposits said negotiable instrument with another bank but omits to forward said instructions, the depositor is thereby divested of title to said instrument.

5. This court in *Burton* v. *United States* merely intended to approve the New York rule but not to go beyond it.

The court is bound by the established course of dealings between petitioners and bankrupts in determining the title to the checks in question.

6. Admitted facts herein showing that petitioners never treated any of their deposits as cash, or as an immediate credit, nor ever drew against their deposits before the collection thereof by bankrupts, nor was it possible for them to so draw, nor were they indebted to bankrupts at any time, conclusively establish, in the absence of any express agreement to the contrary, that petitioners had no right to draw against their deposits prior to the collection thereof by bankrupts, and that the relationship between them and bankrupts was that of principal and agent and not that of creditor and debtor.

7. Petitioners duly fulfilled the duty of tracing the proceeds of their checks to the specific funds in the hands of the trustee in bankruptcy.

(Italics throughout the argument are ours, unless otherwise indicated.)

ARGUMENT.

POINT ONE.

The Circuit Court of Appeals correctly held that the settled legal and technical meaning of the expressions "favor of" and "account of" when used in connection with negotiable instruments implies restriction of their negotiability.

There is nothing in the record at bar that shows that the parties concerned intended to use said expressions in connection with the checks herein involved in any other sense.

The position taken by respondent is that the words "in favor of" and "for account of" were used merely as an identification of the account in the bankrupt's books that was to be credited.

This is an extraordinary argument. Here is the case of several domestic and foreign banks dealing with each other. Such banks undoubtedly are presumed to know banking customs and methods of conducting banking business. Hence, for all the purposes of this case, it may be assumed that the National City Bank of New York and the Banking House of Goldman, Sachs & Co. were well aware of the fact that bankrupts, also a banking house, maintained proper books of account, that in such books transactions of their customers were recorded in due course of affairs, and that any changes in the balances between the bankrupts and the petitioners would be duly noted on the bankrupts' books. In these circumstances, which are not and cannot be denied, it is mere folly to insist that the National City Bank and Goldman, Sachs & Co.

went out of their way to point out to the bankrupts, also a banking house, that in making up their books of account, the bankrupt should not forget to credit the particular account of petitioners with the sums for which checks were delivered to the bankrupts by said banks. We cannot believe that respondent is in earnest in urging upon this court that either petitioners or said New York banks were ever concerned with or cared anything at all about the bookkeeping system of the bankrupts. We submit that respondent in its anxiety to avoid the settled banking technical and legal meaning of said restrictive expressions, is attempting to present a strained and unnatural construction of these expressions, a construction entirely unsupported by the facts and the course of dealing between the bankrupts and petitioners.

Respondent insists that the adoption in respect to the $1,294 check of the National City Bank of the construction urged by petitioners, would mean that the very bank, instructed to pay money to the bankrupts for petitioners, constituted the bankrupts agents of the petitioners to collect these very same moneys from the bank itself.

Far from being unnatural, the above result is a matter of everyday practice with banks in New York and throughout the country. Moreover, this construction is not only warranted by the check of the National City Bank, but the text of said check clearly shows that such was the intention of said bank. We refer the court to the record (R., 28, 30), where it appears that the check of the City Bank had on it the words, "Payable only through New York Clearing House." How the bankrupts could have received actual payments on said checks unless they collected the same from the City Bank through the New York Clearing House is a matter which we are content to leave to the respondent to explain.

The court will bear in mind that the check for $15,000 *was not a cashier's check.* It was an ordinary check drawn by Goldman, Sachs & Co. upon their current account with the Bank of America (R., 31). Hence, it was not to be collected from the same banking institution which drew it, and, consequently, the whole argument of the respondent on that particular question is entirely inapplicable to it.

The check for $1,294 was drawn by the National City Bank of New York to the order of the bankrupts, also New York bankers and stated on its face that it was payable "favor N. Latzko and A. Popper, Budapest." The check for $15,000 was drawn on the Bank of America by Goldman, Sachs & Company, private bankers, upon instruction of Julius Baer & Company, also bankers, at Zurich, Switzerland; was delivered to the bankrupts, another private banking house in New York, for the benefit of the petitioners, private bankers of Budapest, Hungary (R., 31). In other words, we have to deal with banking transactions between bankers who *must* be presumed to use banking terms in the sense usually attributed to them by banking usage and law. It is a case of experts in their particular line of business, employing technical nomenclature in regard to a technical transaction in their branch of business. It is submitted that the law is well settled in such case that the court must apply the settled technical and legal meaning of the expressions "account of" and "favor of" to such words, as were used herein by Goldman, Sachs & Company and the National City Bank when delivering the checks in question to the bankrupts.

Even if respondent had attempted to introduce any evidence on the hearing before the Special Master as to the meaning of said expressions, such

evidence should have been rejected. In *White* v. *Miners' National Bank,* 102 U. S., 658, this court said in regard to the expression "for account of":

> "If this be a sound view of the legal effect of the written indorsement, *neither parol proof nor custom can be received to contradict it.*"

In New York, the rule is similar:

> "Independent of other objections to the evidence offered, to show the meaning of the words 'free from average', it is sufficient to say that *evidence of such a character is not admissible, for the purpose of attaching to those words, when forming part of a written contract, a meaning in conflict with, or variant from that given to them by adjudged cases;* by which their meaning, in precisely such contracts has been determined and was a point in judgment."
>
> *Bargett* v. *Orient Mutual Insurance Co.,* 3 Bos., 385, 397.

And in *Shore* v. *Wilson, 9 Clark & Fin.,* 355, the House of Lords said at p. 514:

> "But, subject to these qualifications, *wherever the words employed bear a definite known meaning, and are capable of being applied according to their plain and ordinary meaning, no evidence is, in my opinion, admissible to show that the party intended to use them in a more extended or in a more qualified sense;* for, otherwise, every man's will and intention, however expressed, would be liable to be defeated. * * *"

In support of our contention that the expression "account of" or "favor of" should be construed in accordance with their settled legal and technical meaning, the following authorities are relied upon:

> "But if no such intention to use the words in any particular or extraordinary sense appears upon the face of the writing, it then becomes the duty of the court to construe the words according to their plain, general, ordinary meaning, subject to certain qualifications. *First, if the words used be technical terms of law, the court must take them according to their strict legal acceptation, although in general and ordinary use they may have acquired a more extensive or a more limited sense.*"
>
> *Shaw v. Wilson*, 9 Clark & Fin., 355.

> "*It may be further laid down as equally well settled, that if parties in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense.*"
>
> *Findlay's Executors v. Findlay*, 11 Grant. (Pa.), 439.

> "*If it is a word of technical or legal character, it must be construed according to its technical or legal meaning.*"
>
> *Hall & Co. v. Culligan*, 91 U. S. Chan. Dec., 120, 123.

> "This being a written contract between two parties, the construction of it belongs to the court; and the court must adopt the usual rules, and construe the provisos or conditions,

as well as the other parts of the instrument, according to the ordinary meaning of the language used; except that terms of art, or technical words, must be understood in their proper sense, unless the context controls or alters their meaning."

Clift v. Schwabe, 3 C. B., 437, 470.

"So, also, if it appears that the term used has an established meaning among those engaged in the business to which the contract has reference, and unless it be given that meaning, is indefinite and equivocal, it should be treated, in interpreting the contract, as used according to that understanding * * *."

Metropolitan Exhibition Co. v. Ewing, 42 Fed., 198, 202.

"Where are words in deeds or in notes and other instruments which have a technical meaning, and are employed accordingly, but language in deeds or notes, or other instruments, not technical, must be taken in its ordinary and usual sense."

Bradshaw v. Bradbury, 44 Me., 356, 358, 359.

"The rule is well settled that, in ascertaining the meaning of words in a deed or other written instrument, technical words must be given their technical meaning and significance. Mitchell v. Mitchell, 2 Gill., 230."

Maryland Coal Co. v. Cumberland & Pa. R. R. Co., 62 Md., 105, 108.

In view of the settled legal and technical restrictive meaning of expressions "favor of" and "account of" as applied to negotiable instruments,

and of the fact that the record is completely bare of any evidence even hinting at the contrary intention of all the parties concerned herein to use said expression in a sense other than that warranted by the settled legal and technical restrictive meaning thereof, there is no ground whatever upon which a decision may be predicated ascribing to these New York banks and bankers an intention to specifically direct the bankrupts to perform on their books what the respondent itself designates as "an every day transaction."

POINT TWO.

White v. Miners' National Bank, has been considered an authority for the proper meaning of the words "account of" for half a century, and is in accordance with earlier authorities.

Respondent's attempted distinctions of the doctrine in White case from the facts at bar were properly rejected by the Circuit Court of Appeals.

Prior to discussing respondent's main objection to the doctrine announced by this court in *White v. Miners' National Bank*, 182 U. S., 658, to wit, that insofar as the opinion therein affects the case at bar it was merely a *dictum*, we will answer some of the minor objections to the applicability of the White case to the checks herein involved.

Respondent insists that the doctrine of the White case is limited in its application to such restrictive indorsements on negotiable instruments as appear on the back thereof, and does not apply to indorsements appearing elsewhere. This contention

is untenable, because the place where the indorsement of a negotiable instrument appears is entirely immaterial. An indorsement does not cease to be such because it happens to be written either on the front of a negotiable instrument or in a memorandum accompanying the same. The following authorities leave no room for any doubt on this point:

Richards v. *Warring*, 29 Barb. (N. Y.), 42, 43;
Bank of America v. *Wingdell*, 187 N. Y., 115, 120;
Haines v. *Dubois*, 39 N. J. L., 259, 260, 262;
Farmers' Trust Co. v. *Schrunit*, 82 Ill. A., 267, 273, 274;
Crowdery v. *Johnson*, 69 Vt., 595, 597.

Respondent's next objection is based on the fact that the negotiable instrument involved in the *Klein* case was a private paper and not a bank paper. It insists that because one of the checks at bar was a cashier's check (which it will be remembered was payable only through the New York Clearing House) it should be treated as such. The court will bear in mind that the larger check here, to wit, the check of Goldman, Sachs & Co. for $15,000 is not a cashier's check, but an ordinary private check. A bank cashier's check is nothing but a negotiable instrument in the nature of an accepted bill of exchange drawn on itself.

Seisdedt v. *Marine State Bank*, 11 N. D., 89, 95;
Henry v. *Allen*, 151 N. Y., 1, 22;
Bullock v. *Second National Bank*, 147 N. Y. Supp., 167, 169.

Even if we assume that the check of a bank's cashier is equivalent to a certified check, the law is against the respondent's contention. It has been repeatedly held that even certified checks are not cash and are subject to ordinary rules of collection, prior to which such checks do not extinguish the debt and are not equivalent to a payment in cash.

Dike v. *Drexel*, 11 App. Div., 77, 83;
Davenport v. *Palmer*, 152 App. Div., 761, 763.

Further objection of the respondent is based on the fact that bankrupts credited on their books the account of petitioner's with the amount of the checks at bar prior to their collection.

The mere fact that the bank with whom the depositor has a current checking account credits a depositor on its books with the amount of the anticipated proceeds of the checks deposited with it for collection, prior to the actual collection thereof, in no way affects the legal title of the depositor to such checks. In New York the matter is regulated by statute, which provides that unless the bank gives value for the check it does not become the owner thereof (Negotiable Instruments Law, Laws 1909, Chapter 43, Section 91). As the New York courts recently held:

> "It is not the absolute credit given in the case of a purchase, *but a mere bookkeeping credit for convenience.*"
>
> *First National Bank* v. *Stumpf*, 169 N. Y. Supp., 227, 229, affirmed in 185 App. Div., 906 and 227 N. Y., 659.

This court in *Thompson* v. *Sioux Falls National Bank*, 150 U. S., 230, said on page 233:

> "The mere credit of a check upon the books of a bank, which may be cancelled at any time, does not make the bank a *bona fide* purchaser for value."

Similarly, in *St. Louis and San Francisco Ry. Co.* v. *Johnston*, 133 U. S., 556, this court said on page 576:

> "The draft was entered at its full value, which indicated that it was not discounted, *but credited for convenience and in anticipation of its payment.*"

The following authorities are to the same effect:

Levi v. *National Bank of Missouri*, 5 Dill., 104, 110, 111;
Citizens State Bank v. *Coules*, 189 N. Y., 346, 349;
Merchants National Bank v. *Santa Maria Sugar Co.*, 162 App. Div., 248, 252;
Stein v. *Empire Trust Co.*, 148 App. Div., 850, 853;
Albany County Bank v. *Peoples Ice Co.*, 92 App. Div., 87;
Jones v. *Kilbreth*, 39 Ore., 91, 101, 111.

Again, the doctrine of the *White* case is in no way affected by the fact that the owner of the checks restrictively endorsed, happens to have a current checking account with the bank to which such restrictive checks are delivered by him for collection. Even if it is assumed that instructions given in the case at bar to the bankrupts that the deposit of petitioner's checks was made for "account of" or "credit of," amount in law and under the facts herein to the delivery of said checks to

the bankrupts "for collection", then it becomes clear that the alleged distinction of the respondent is without merit.

The only difference resulting from the fact that in the *White* case the owner of the check did not have a current checking account with the depositary and that the petitioners had such an account with the bankrupts is that in the *White* case the defendant bank *would not* have acquired the title to the proceeds of the checks *even after their collection*, but that the bankrupts in the case at bar *would* have acquired the title to the proceeds of petitioners' checks, *if they had collected said checks prior to the filing of their petition in bankruptcy.*

This view is supported by an unbroken line of authorities.

Re Jarmulowsky, 249 Fed., 319, 320, 321 and 322.

Re Havens, 8 Benedl., 309, 310, 311.

Levi v. *National Bank of Missouri*, 5 Dill., 104, 106, 109.

Manufacturers National Bank v. *Continental Bank*, 148, Mass., 553, 558, 559.

First National Bank v. *First National Bank*, 76 Ind., 561, 569, 570.

Morse on Banking (5th Ed.), Section 567.

In *American National Bank* v. *Miller*, 229 U. S., 517, private banker Plant delivered his personal check drawn on the American National Bank of Nashville, Tenn., to the First National Bank of Macon, Ga., in payment of a debt from him to the Macon Bank. The Macon Bank had an account with the Nashville Bank, indorsed Plant's check generally and sent it to the Nashville bank. On the day said check was received by the Nashville

bank and credited to the account of the Macon Bank with it, a petition in bankruptcy was filed against Plant in Macon. The Nashville bank attempted to charge the amount of this check off the account of the Macon Bank with it, after it learned of Plant's bankruptcy. This court held that the Nashville Bank could not do so and stated the reason for such decision thus (at p. 520):

> "There are some disadvantages of sending a check for collection directly to the bank on which it is drawn, but *when such bank performs the dual function of collecting and crediting the transaction is closed*, and in the absence of fraud or mutual mistake, is equivalent to payment in usual course. *First National Bank* v. *Burkhardt*, 100 U. S., 689. In the present case it was as though an officer of the Macon bank had presented the check to the teller of the Nashville bank, and on receiving the money, had paid it back over the counter in deposit to the credit of the Macon bank."

At the time the petition in bankruptcy was filed herein against the bankrupts, they had not performed "the dual function of collection and crediting." The facts in the case at bar are stronger than in the *Siller case* (*supra*), since in that case the check was drawn on the *self-same* bank wherein the depositor had a checking account, while in the case at bar all of the checks were drawn on banks *other* than that wherein petitioners had their account.

Respondent contends that the opinion of this court in the *White* case, insofar as it discussed the interpretation of the expression "*for account of*" was merely a *dictum*. Casual examination of the

opinion suffices to refute any such implication. This court expressly said at page 660:

> "Because of the words 'for account of Miners' National Bank of Georgetown, Colorado,' in this indorsement by Brownell, as president of the bank, the Circuit Court ruled that no obligation arose out of the transaction on the part of the bank to pay the draft or return the money, although due demand of the acceptor and refusal to pay was proved, with notice to the bank. *And this is the principal question which we are to decide.* * * *"

For over a half a century, the *White* case has been an authority for the proposition stated by us *supra*. It has never been doubted, distinguished or overruled. It has been repeatedly relied on by this court in its later decisions and by the highest appellate courts in many States as authority upon the question of restrictive indorsement.

Thus, in *Commercial National Bank* v. *Armstrong*, 148 U. S., 57, this court said:

> "And in *White* v. *Miners' National Bank of Georgetown*, 102 U. S., 658, where an indorsement was 'for account,' the same justice, speaking of the indorsement, said:
>
> 'It does not purport to transfer the title of the paper or the ownership of the money when received.'
>
> The plaintiff then, as principal, could unquestionably have controlled the paper at any time before its payment and this control extended to such time as the money was received by its agent, the Fidelity."

Again, in *Old National Bank* v. *German-American National Bank*, 155 U. S., 556, 562, this court

cited the *White* case as authority on the question of restrictive indorsements.

In *Bank of Metropolis* v. *First National Bank*, 19 Fed., 301, Wallace, J., after referring to indorsement 'for collection' said:

> "In *First National Bank* v. *Pennsylvania Co. Bank*, 3 Fed. Rep., 257, paper was indorsed 'pay to the order of Hetherington & Co. on account of First National Bank, Chicago,' and it was held to be such a restrictive indorsement as to charge subsequent holders with notice that the indorser had not transferred title to the paper, or its proceeds. Under either form of indorsement the natural and reasonable implication to all persons dealing with the paper seems to be that the owner has authorized the indorsee to collect it for the owner, and conferred upon him a qualified title for this purpose and for no other. Other authorities in support of this conclusion are: *Sweeney* v. *Easter*, 1 Wall., 167; *White* v. *National Bank*, 102 U. S., 658; *Lee* v. *Chillicothe Bank*, 1 Bond., 389; *Blaine* v. *Bourne*, 11 R. I., 119; *Claffin* v. *Wilson*, 57 Iowa, 15."

As late as 1925 Wolverton, J., in *Nyassa-Arcadia Drainage District* v. *First National Bank*, 3 Fed. (2nd), 648, cited the *White* case in its customary meaning:

> "Nor does the indorsement 'for account' purport to transfer the title of the plaintiff or the ownership of the money when received. *White* v. *National Bank*."

In *Tyson* v. *Western Nat. Bank*, 25 Atl., 520, 521, the Court of Appeals of Maryland relied on the *White* case in its conventional sense.

"In the present case the check and draft were deposited with Nicholson & Sons with an indorsement in these words: 'For collection for account of Tyson & Rawls.' This indorsement was not adequate to pass to Nicholson & Sons the title to these papers. It has been so held by this court, and the Supreme Court of the United States and other courts. * * *

In *White* v. *Bank*, 102 U. S., 658, it was said: 'The plain meaning of it (the indorsement) is that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser."

In *Freiberg* v. *Stoddard*, 28 Atl., IIII, the Supreme Court of Pennsylvania considered the *White* case as holding that "for account of" implied restriction on the negotiability of an instrument:

"An indorsement for collection is restrictive, and carries no power of sale with it. In such case, the indorsee is a mere agent for an indorser and such indorsement has been said not to amount to a transfer of title. So an indorsement 'for collection for my account,' or 'for account of it,' is restrictive and does not pass the title, or the right to proceeds, of the instrument. The indorsee takes the instrument as agent or the trustee for the indorser; and if he disposes of it for his own use, the indorser may recover from the purchaser the amount collected on it, or he may recover the

> bill itself in an action of trover. By such restrictive indorsement the indorsee takes the instrument, subject to the trust created. *Rand Com. Paper,* Par. 726; *Daniel Neg. Inst.,* Par. 698; *White* v. *Bank,* 102 U. S., 658; *Sweeney* v. *Easter,* 1 Wall., 166; *Bank* v. *Gregg,* 79 Pa. St., 384; *Hackett* v. *Reynolds,* 114 Pa. St., 328."

In *U. S. National Bank* v. *Geer,* 55 Neb., 462, 464, 465, the highest court of Nebraska said:

> "In *First National Bank of Chicago* v. *Reno County Bank,* 3 Fed. Rep., 257, it was distinctly decided that an endorsement of a bill of exchange directing the drawee to pay to another 'on account of the endorser,' or 'for collection' is a restrictive endorsement carrying with it notice that the endorser did not thereby part with title to the paper or to its proceeds when collected. The same effect are *Beal* v. *City of Somerville,* 50 Fed. Rep., 647; *Sweeney* v. *Easter,* 68 U. S., 166; *Balbach* v. *Freylinghuysen,* 15 Fed. Rep., 675; * * * *White* v. *Miners' Nat. Bank,* 102 U. S., 658."

There are numerous authorities preceding the decision of the United States Supreme Court in the *White* case, uniformly holding that words "for account of " restrict the negotiability of commercial paper.

Thus, in *Treuttell* v. *Barandon,* 8 Taut., 100, the court held that an indorsement "pay to J. or order for account of N." constituted a restrictive indorsement. The court remarked that such indorsement has been known to commerce and law for many years and has always been considered as implying restriction of negotiability.

In *Lee* v. *Chillicothe Branch of State Bank,* 15 Fed. Cas. (Nos. 8186, 8187) 150, 151, 152, both the District and the Circuit Courts discussed at length various restrictive indorsements, including words "for account of" and stated that:

> "It imports that indorsee receives the bill for a special purpose, and as a trustee for the party indorsing; and is equivalent to direct notice to every customer to whom it may be afterwards presented, that he has no right to dispose as his own property."

In *First National Bank* v. *Lynn,* 132 Mass., 227, 228, the deposit was: "for account of First National Bank of Lynn, Mass." The court said:

> "The words 'for account of' merely indicate the relations which the two banks hold to each other in the transaction. At the most, they show that the note was indorsed to the bank in Boston, not upon a valuable consideration, but for collection."

In *Hackett* v. *Reynolds,* 114 Pa., 328, the indorsement was "Pay S. H. Lamberton, Cashier, or order, for account, Penn. Bank, Pittsburgh. G. L. Reiber, Cashier," and the court said of Reynolds, Lamberton & Co., that

> "They had an undoubted right to treat the Penn. Bank as the actual owner of the note."

In *Leary* v. *Blanchard,* 48 Me., 269, the deposit was "for account of the Atlas Mutual Insurance Co." The court stated at page 274:

> "The indorsement, by its terms, was restricted, and the ordinary and popular sense

cannot be changed by parol evidence. 1 Greel. Ev., Par. 295."

In *First Nat. Bank of Belmont* v. *First Natl. Bank of Barnesville,* 58 Oh. St., 207, the court said at p. 215:

"* * * when, the indorsement is 'for collection' or 'for account of' it is notice to the drawee bank that the bank presenting the check for payment is not the owner but only the agent of the owner, and that the money is to be remitted to the owner, back through the same channel through which the check or bill was received by the collecting bank."

In *First National Bank of Chicago* v. *Reno County Bank,* 3 Fed. Rep., the court said, at page 261:

"July 29th, 1878. Pay to the order of W. Hetherington & Co., Atchison. Account of First National Bank, Chicago. L. J. Cage, Cashier.

This was clearly a restrictive indorsement, the effect of which was to restrict the further negotiability of the bills and to give notice to the defendant that the plaintiff did not thereby give title to them or to their proceeds, when collected. 1 Daniell on Negotiable Instruments, Par. 698, and cases cited."

In order to succeed on this appeal, it is not sufficient for respondent to persuade this court that the words "account of" indicated mere instruction by the depositors and third parties as to the bookkeeping system of the bankrupts, but also that the proceeds of the two checks in question were intended to be paid to the bankrupts, not for the bene-

fit of petitioners, *but for the benefit and the beneficial use of th bankrupts themselves.* Nothing short of such proof would be sufficient to change the capacity in which the bankrupts acted in the case at bar, from that of agents and trustees for petitioners, to that of owners of the proceeds of the checks in question.

In *Lee* v. *Chillicothe Branch Bank* (No. 8186), 15 Fed. Cas., The District Court said, at pages 150-151:

> "Without stopping to analyze the many cases referred to, in which endorsements have been held to be restrictive in their character, as suspending the further negotiability of commercial paper, the following instances may be briefly stated: '*to pay to my use*' 'pay to A only', 'pay the contents to the use of B only', '*pay the money to my servant for my use,*' 'carry this bill to the credit of A,' 'the within must be credited to L. H. value in account,' 'pay to J. P., or order for account of T. M. W.' *Chitt. Bills,* 176, 177; *Pyles Bills,* 121 (Marginal paging); *Edw. Bills & N.,* 277, 278; Stor. Bills, Par. 211; *2 Burrows,* 1227; Doug., 637; 8 *Taunt.,* 100; 15 *E. C. L.,* 319; 3 *Mass.,* 227; 5 *Mass.,* 544."

On appeal the Circuit Court said (No. 8187; 15 Fed. Cas.), at page 152:

> "Whether an endorsement be restrictive or not, depends upon the intention of the parties as expressed 'Pay to J. S. only,' '*pay to A. for my account*' '*pay the contents of my use*'; 'pay the contents to the use of a third person'; '*pay to A. B., or order, for my use,*' '*pay to A. B. for my account*'; 'pay the within to A. B. for the use of C. D.'; '*pay the money to my use*';

'pay the money to my servant for my use.'— these are specimens from cases where the endorsements have been held restrictive. More might be added, but the above are sufficient, and they all rest upon the principle that from the nature of the restriction, the negotiability of the bill ceases. * * *"

"'Pay J. H. for my use *or for my account,'* shows the intent of the endorser, and is barely an authority to receive the money upon it. *It imports that endorsee receives the bill for a special purpose, and as a trustee for the party endorsing;* and is equivalent to direct notice to every person to whom it may be afterwards presented, that he has not a right to dispose of it as his own property." *Edw. Bills & N.*, 277.

There is no mystery whatsoever attached to the words "account of" and "favor of". In fact, it is submitted, that irrespective of the words used (of which there may be an endless variety, as shown in the two quotations from *Lee* v. *Chillicothe Branch Bank, supra*), whenever a third party attempts to make a payment otherwise than in actual cash currency not to the creditor directly, but to an intermediary (in this case the bankrupts) who is to take the proceeds of whatever value is delivered to him and to pay them to the creditor either directly or by crediting the creditor's account with the intermediary, the intermediary acts in the transaction as and will be deemed in law to be, prior to the receipt of the proceeds by him, the agent or the trustee for the creditor.

Morse on Banking (5th Ed.), Section 567;
Montague v. *Pacific Bank,* 81 Fed., 602;
Woodhouse v. *Crandall,* 197 Ill., 104, 109;

Star Cutter Co. v. *Smith,* 37 Ill. App., 212;
People's National Bank v. *Wheeler,* 21 Okla., 387; 96 Pac., 619.

In accordance with the above doctrine, Section 66 of the Negotiable Instruments Law of New York provides:

> "An indorsement is restrictive, which either: (3) Vests the title in the indorsee in trust for *or to the use of some other person.*"

Similarly, in *White* v. *Miners' National Bank* (supra), the court, referring to the indorsement "for account of," said:

> "The plain meaning of it is, that the acceptor of the draft is to pay to the indorsee *for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper* or the ownership of the money, when received."

Unless respondent can show that the intention of the New York banks was to transfer the beneficial interest in the checks in question and to pay the proceeds thereof *to the use of the bankrupts,* it fails in its attempt to prove that title to said checks was at the time the petition in bankruptcy herein was filed in the bankrupts and not in petitioners.

POINT THREE.

The Circuit Court of Appeals erred in holding that the memorandum accompanying the check for $15,000 and stating that the same was delivered to the bankrupts "for account of" petitioners, did not constitute a part of the contract controlling the title of the parties to said check.

It is elementary that the general rules governing the construction of all contracts apply equally to negotiable instruments, so far as their construction is concerned. In particular, a negotiable instrument must be construed in the light of a separate contemporaneous oral or written agreement as forming one single contract with it.

> *Thompson* v. *Riggs*, 5 Wall., 663, 678;
> 8 *Corpus Juris*, 85.

In the case at bar, the Circuit Court of Appeals said:

> "The important fact is that this $15,000 check is on its face a straight unrestricted cashier's check payable to the order of the bankrupts. The petitioners state they caused Goldman, Sachs & Company, as their agents, to deliver it. *The letter which Goldman, Sachs & Company sent with the draft simply amounted to an explanation to the persons to whose order it was drawn, that it was to be placed in the account of the petitioners.* This they did as the agents of the petitioners. *The legal effect of the transaction was the same as though the petitioners had themselves deposited the check*

'for our account' with the bankrupts on June 15th and the latter had at once credited it to the petitioners, and then on the same day transferred the title to the check to the American Exchange National Bank, which on the same day credited it in the bankrupts' account" (R., 84, 85).

In the case at bar, the District Court held that:

> "In respect to the last two checks, it is true that 'for account of' ordinarily means for collection and that *an agency may be indicated by letter of instruction or by a notation as well as by the restrictive endorsement. Boone County National Bank* v. *Latimer,* 67 Fed., 27" (R., 39).

The holding of the District Court herein and in the *Latimer* case, *supra,* is in accordance with numerous decisions of the State Courts of last resort throughout the United States. As the court said in *Re State Bank,* 56 Minn., 119, 123:

> *"There can be no doubt* that if a draft or other paper is delivered to a bank for collection, the mere fact that the indorsement of the owner is unrestricted will not, as between him and the bank, make the latter the owner of the property."

It has long been established that the intention of the parties delivering a negotiable instrument, to part or not to part with title to it, may be evidenced by an *oral* agreement, or an understanding to that effect.

> *Matter of Marine,* 169 A. D., 65, 67;
> *Turney* v. *Guthrie,* 15 N. Y. Sup., 679, 680;

Barker v. *Prentice*, 6 Mass., 430, 433, 434;
German Fire Insurance Co. v. *Kimble*,
66 Mo. App., 370, 371, 373.

With still greater force, the above rule applies to the case of *written* instructions accompanying negotiable instruments bearing no restrictive indorsements on their face. The following authorities uniformly support the rule of law, that memoranda accompanying negotiable instruments should be construed together and form a part of one and the same contract, evidenced by the negotiable instrument itself and the memorandum accompanying it:

"Sec. 208. *Instructions accompanying a deposit and coming from the proper authority, must be carefully attended to.* When the depositor orders his money to be put on one of his accounts, or to be applied to take up a particular check or note, or to be transmitted to a certain person, or *whatever special direction he may give, the bank must obey if it receives the deposit at all.*"

Morse on Banks & Banking (5th ed.), page 409.

"*It is true that the paper came to the plaintiff's hands by general indorsement from Ives & Son, but the indorsement and the letter of advice in transmission must be read together, and so reading them the legal effect was to make the indorsement restrictive and the same in character as if the contents of the letter had been incorporated in the indorsement.* It follows, therefore, that upon the facts found, and as to which there was little if any dispute, the

plaintiff never acquired title to the bill. It was an agent merely for its collection. It was only in that character that Ives & Son received the paper from the drawer, and that was the only title that was conferred upon the plaintiff."

Bank of America v. *Waydell,* 187 N. Y., 115, 120.

"While the deposit of a bill or check in the ordinary course of business, the depositor receiving a credit against which he can draw, has the effect of transferring the title (*Briggs* v. *Central Nat. Bank of N. Y.*, 89 N. Y., 182; *Metropolitan Nat. Bank* v. *Lloyd,* 90 id., 530; *Cragie* v. *Hadley,* 99 id., 131). I do not think that was the effect of the original deposit involved in this case. *The words on the deposit slip must be read into the contract.*"

King v. *Bowling Green Trust Co.*, 145 A. D., 398-401.

"A part of this lumber was sold, and a draft was drawn in payment of the same, which draft was indorsed by Cochran & Co., to plaintiff, Long, and forwarded to him at Chicago, Ill., who, by letter, sent the same to the Bank of Commerce for collection, inclosed in the following letter: 'Chicago, July 24, 1926. Bank of Commerce, Louisville: Please find John L. Cochran & Co. check on your bank for $500, which please place to my credit; also J. L. Cochran & Co. draft, 30 days, after date July 5th, on Rodgers & Co., Peoria, Ill., for $309.81, which please collect and credit. Very truly yours, Jno. S. Long.' * * *

We cannot concur with this reasoning of the

Judge of a lower court, and, upon carefully examining the evidence in whole case, we fail to find sufficient evidence to support the judgment, and are of opinion that the court erred in refusing appellant a new trial."

Long v. *Bank of Commerce,* 38 S. W., 886, 887.

"The instruction which accompanied the draft when received by the bank was as follows: 'Inclosed herein please find our draft for collection, which we have made on the San Antonio Banking Association of your City. Kindly give this your immediate attention, and oblige, your truly, Townsend, Hostetter & Co.' * * * *There is nothing from which could be implied an authority for the bank to hold the money and treat it as a deposit."*

Hunt v. *Townsend,* 26 S. W., 310, 311.

"The draft on Erwin & Co., with bill of lading attached, sent to the Shapard Bank for collection by the Bank of Commerce, *was coupled with instructions* from the latter bank for specific application of the proceeds of the draft where collected. *These specific instructions took the particular transaction without the ordinary course between corresponding banks, in which the relation of creditor and debtor, or general depositor, would result.* * * *."

Hutchinson v. *National Bank of Commerce,* 145 Ala., 196, 201.

Finally, the transaction in the case at bar took place entirely within the State of New York. It must be deemed to be covered by the law of New

York concerning negotiable instruments. Section 35, of the New York Negotiable Instruments Law, provides as follows:

> "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. * * * the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, *and not for the purpose of transferring the property in the instrument.*"

This appeal, based upon the reclamation proceeding of petitioners, charges the respondent as trustee in bankruptcy with all the equities, which petitioners had against the bankrupts. That, of course, includes the notice restricting the negotiability of the check for $15,000 contained in the memorandum accompanying its delivery by Goldman, Sachs & Co. to the bankrupts.

Since the American Exchange National Bank was merely a gratuitous holder of said check and the proceeds thereof, having parted with no value therefor, the fact that it collected said check for the bankrupts herein has no bearing whatsoever upon the title to the proceeds of said check as between the bankrupts and petitioners. Furthermore, this question becomes merely academic in this case because, as respondent concedes, the full amount of the proceeds of said check was received by the trustee (Point Seven, *infra*).

POINT FOUR.

The Circuit Court of Appeals erred in holding that where a negotiable instrument indorsed in blank is delivered by the depositor to his bank with restrictive instructions and the bank deposits said negotiable instrument with another bank but omits to forward said instructions, the depositor is thereby divested of title to said instrument.

The Circuit Court of Appeals in its opinion in the case at bar stated:

> "The legal effect of the transaction was the same as though the petitioners had themselves deposited the check '*for our account*' with the bankrupts on June 15th and the latter had at once credited it to the petitioners, and then on the same day transferred the title to the check to the American Exchange National Bank, which on the same day credited it in the bankrupts' account. *That transaction made the American Exchange National Bank the owner of the check on June* 15 *and the proceeds when collected on June* 16*th belonged not to the petitioners or to the bankrupts but to the bank which was the owner of the check when it was collected.* We think the transaction is governed by the rule laid down in the *Burton* case, and that the relation between the petitioners and the bankrupts on June 15, when this check was credited by the latters to the former, was that of creditor and debtor, and that the proceeds of this check when it was collected on June 16th did not belong to these petitioners * * *" (R., 84, 85).

It is clear from the facts herein that petitioners completely traced the proceeds of the said check for $15,000 to the securities of the bankrupts returned by the American Exchange National Bank to the trustee for the bankrupt (see Point Seven hereafter). Hence no question arises as to any equities on the part of the American Exchange National Bank to the proceeds of said check for $15,000. It therefore follows that the American Exchange National Bank was merely a gratuitous holder of said proceeds of said check for $15,000 without having parted with any consideration past or present therefor, and the trustee stands in the shoes not of the American Exchange National Bank but in those of the bankrupts.

The doctrine that the Circuit Court of Appeals intended to apply to the case at bar is unsound and was rejected in other cases by the same Circuit Court and by other State and Federal Courts.

A deposit accompanied by instruments establishing between the depositor and his bank the relationship of principal and agent, thereby creates a confidential relationship between them, and the proceeds of such deposit are trust moneys, the title to which remains in the depositor so long as he is able to trace the same.

When there is a relationship of principal and agent between the depositor and the bank, the proceeds of negotiable instruments received by the agent are deemed to be held by the agent *in trust* for the principal.

Central National Bank v. *Connecticut Mutual Life Ins. Co.*, 104 U. S., 54, 67, 70, 71;

VanAlen v. *American National Bank*, 52 N. Y., 104;

Roca v. *Byrne*, 145 N. Y., 182, 187;

Farmers & Mechanics National Bank v. *King*, 57 Pa., 202, 205;
Merrill v. *Bank of Norfolk*, 19 Pick. (Mass.), 32;
Hutchinson v. *National Bank of Commerce*, 41 So., 143, 144;
Hewitt v. *Hayes*, 205 Mass., 356, 363.

The principle of the above cases has been invariably applied to banking transactions and constitutes an integral part of the banking law of this country.

> "*Instructions. If the customer gives any instructions or directions* concerning any item or the method which is to be pursued in collecting or protesting the paper, *the bank receiving the paper is bound to forward such instructions and directions to its agent or correspondent.*"
>
> *Morse on Banks & Banking* (5th Ed.), page 458.

The Circuit Court of Appeals for the Second Circuit applied this doctrine in the case *In re Berry*, 147 Fed., 208, 210, 211, where it said:

> "Stripped of all complications and entanglements we have this raked fact that Raborg and Manice by mistake paid Berry & Co., $1,500 which they did not owe and which Berry & Co. could not have retained without losing the respect of every honorable business man. * * *
>
> It is unnecessary to enter further into details of the bank's transactions subsequent to the failure it is enough to say that as the final result of the bank's liquidation of the account $6,310.41 was delivered to the trustees in

> bankruptcy. But for the mistake of Raborg & Manice this sum would have been $4,810.31 which is all the bankrupts' creditors are entitled to. The $1,500 should be paid by the trustees to Raborg & Manice, its lawful owners."

In the case at bar the Circuit Court of Appeals held in regard to the check for $15,000.00:

> "The proceeds when collected on June 15, belonged not to * * * bankrupts, but to the bank which was the owner of the check when it was collected" (R., 253).

In *Berry* case, *supra,* the same court held that the bankrupts had no title to the proceeds of a check deposited by them to their current checking account with their bank prior to the filing of the petition in bankruptcy. It did not hold in the *Berry* case that the bank of the bankrupts acquired title to said proceeds as it did in the case at bar.

Similarly, in *Titlow* v. *McCormick*, 236 Fed., 209, the bankrupt bank received for the collection certain school district warrants, which it collected through *three* different correspondent banks. At the time of the bankruptcy, it had a credit balance with *one* of these banks. The Circuit Court of Appeals for the Ninth Circuit said at page 215:

> "The record does show, however, that such deposit of the United States National Bank of Centralia with the Bank of California of Tacoma was not entirely dissipated, but there remained of such deposit at the time of the suspension of the former the sum of $1,585.36, which passed into the hands of the receiver of its assets, and to which only the appellee is, in

our opinion, entitled to a preference over the general creditors of the insolvent bank."

To the same effect is *In re Royca's Estate,* 143 Fed., 182, where the court said at pages 183, 184:

> "It appears from the record that at the time of adjudication the bankrupt had on deposit in a bank $390.70, which has since come into possession of the trustee of his estate. The deposit included $120, which the petitioner had theretofore intrusted to the bankrupt for safe keeping. * * * The bankrupt did not keep the money separately, but made a deposit thereof in a bank in which he had other money on deposit, so that it became mingled with other money held by the bank subject to his check, and the balance to his credit exceeded the amount received from the petitioner, at all times continuously from the date of the deposit until it was withdrawn by the trustee, who now has it in custody. * * * In this case, although the money cannot be specifically identified, the fund is clearly proved to have been enlarged by mingling trust money with other money, and the equitable right of the petitioner to reclaim the amount equivalent to the amount intrusted is clear. *San Diego County* v. *Cal. Nat. Bank,* 52 Fed., 59; *Massey* v. *Fisher,* 62 Fed., 958; *City of Spokane* v. *First Nat. Bank,* 68 Fed., 982; *Bradenburg on Bankruptcy* (3rd Ed.), page 768."

Still better illustrations of the principle, that the depositor's bank cannot change the nature of the deposit by mere failure to transmit to the collecting bank specific instructions given to it by its depositor are the four following cases:

In *Drovers' Nat. Bank* v. *O'Hare,* 119 Ill., 646, customers of the Drovers' Bank made a deposit stating that it was for the credit of the Henry Bank "for the use of M. J. O'Hare."

The Drovers' Bank sent a check for the amount of said deposit to the Northwestern National Bank, stating that the said amount was for the credit of the Henry Bank but omitting to mention O'Hare's interest. The Henry Bank failed, before O'Hare was paid, and the Northwestern Bank applied the amount of the check of the Drover's Bank to wipe out the indebtedness of the Henry Bank to it.

The court said:

> "But if the Henry Bank must, from the character given the funds in the hands of the appellant, account to the appellee therefor, it was the duty of appellant to give notice to any intermediary it might select, of the trust character impressed upon the funds, and not permit it to be carried to the general account of the trustee, to be applied upon its debts (*Perry on Trusts,* 406, 443, 444, and authorities cited). * * *
>
> *In what is claimed as an attempt to transfer the funds to the Northwestern National Bank, appellant withheld all indications of the trust character of the funds, or that it was other than money going to the general account of Henry Bank. To this appellee in nowise consented, and appellant stands in no better position that if it had retained the money in its custody."*

The above decision was followed in the *Union Stock Yards Nat. Bank* v. *Dumond,* 33 Ill. App.,

102, where the check was deposited "for the use of George W. Dumond", and the court said at page 103:

> *"Here the fault of the Stock Yards Bank was in depositing the money of Dumond with the Merchants' National Bank, without preserving its identity in pursuance of instructions which were entirely plain. Having accepted the money with the instructions, it should have pursued the course marked for it."*

Again, in *Hutchinson* v. *National Bank of Commerce*, 41 So., 143, the court said on page 144:

> *"The draft* on Erwin & Co., with bill of lading attached, sent to the Shapard Bank for collection by the Bank of Commerce was coupled with instructions from the latter bank for specific application of the proceeds of the draft when collected. *These specific instructions took the particular transaction without the ordinary course between corresponding banks, in which the relation of creditor and debtor, or general depositor would result; and the collecting bank could not without the consent of the initial bank and in violation of the latter's instructions, alter or change the relation so created by any subsequent conduct or action of its own in dealing with the proceeds of the draft when collected."*

Finally, in *Beaver Boards Co.* v. *Imbrie & Co.*, 282 Fed., 655, 656, the court held that:

> "The check deposited with the broker here was accompanied by the express written stipulation: 'Which you will hold *for my account* against any purchases of stock on my order,

same to be held by you until the account is closed.' * * * *Depositing the money in the general account of the broker did not alter its character as between Imbrie & Co. and Lynch. Central Nat. Bank* v. *Conn. Mutual Ins. Co.*, 104 U. S., 54."

POINT FIVE.

This court in Burton v. United States merely intended to approve the New York rule but not to go beyond it.

The court is bound by the established course of dealings between petitioners and bankrupts in determining the title to the checks in question.

In its brief below, respondent made an earnest attempt to bring the facts in the case at bar within the facts of *Burton* v. *United States*, 196 U. S., 283, and in doing so dwelt upon a few of the superficial features, which at first blush appear to bear semblance to the facts at bar.

In the *Burton* case, the court said at pages 296, 297:

"* * * The evidence was wholly undisputed that each of them was received by the defendant in the City of Washington, D. C., and by him therein indorsed and deposited with the Riggs National Bank of Washington, D. C., and that they were afterwards duly paid by the Commonwealth Trust Company, at St. Louis, Missouri; that the amount of each was in each instance immediately credited by the Riggs National Bank to the account of the de-

fendant with the bank, *and the cashier testified that defendant had the right immediately after the credit was made, to draw out the whole, or any portion thereof, without waiting for payment of the check at St. Louis.*

"There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, endorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account *and nothing further was said in regard to the matter.* In other words, it was the ordinary case of the transfer or sale of the check by the defendant, and the purchase of it by the bank, upon its delivery to the bank, *under the circumstances stated,* the title to the check passed to the bank, and it became the owner thereof. *It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank, it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed.*"

Let us analyze "the circumstances stated" which led this Court to a decision reversing the previous doctrine in federal courts on the point and adopting the so-called New York rule.

The salient facts were the following:

(1) Depositor had a *current checking account* with the bank;

(2) Depositor *received personally checks* drawn to his order;

(3) Depositor *personally endorsed* such checks *in blank;*

(4) Depositor *personally delivered* his checks so endorsed to the bank;

(5) Depositor *received immediate credit* for the amounts of said checks from the bank;

(6) Depositor *had right to withdraw* from the bank the face value of said checks at once;

(7) There was *no special agreement* between the depositor and the bank as to the title to the deposits;

(8) *Nothing was said or done* at the time said deposit was made.

Compare the above facts with the facts at bar.

1. Petitioners *did not receive personally* checks herein, *nor were said checks drawn to their order.* The checks were drawn to the order of the bankrupts who were told by the depositing New York banks that the proceeds of said checks were to be paid to petitioners.

2. Petitioners *did not personally endorse* the checks herein in blank or otherwise.

3. Petitioners *did not personally deliver* the checks herein to the bankrupts. The checks at bar were deposited with bankrupts by New York banks upon order of European banks (R., 28, 31) other than that of petitioners.

4. *There was no physical possibility for petitioners to draw at once on the bankrupts* as against the

face value of the checks herein, because petitioners were in Budapest and had to be first advised that either a payment was made for their account to the bankrupts or that the bankrupts received any moneys for their account.

5. Petitioners *never drew on the bankrupts* against any deposits made by them prior to the collection thereof.

6. Petitioners *had no agreement with the bankrupts to treat evidences of debt* deposited with the bankrupts for collection or otherwise *as a deposit of cash.*

7. Petitioners *had no agreement with the bankrupts that an immediate credit should be given* by the bankrupts to them upon the receipt of any evidences of debt from them.

8. Petitioners *did not treat any of their deposits* with the bankrupts *as a deposit of cash.*

9. Petitioners *never treated any of their deposits as an immediate credit* open to them with the bankrupts.

10. *Certain instructions restricting negotiability of the checks herein were conveyed to the bankrupts at the time of the delivery of said checks.*

Can respondent insist that in the case at bar:

> "*There was nothing whatever in the evidence* showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated."
>
> *Burton* v. *United States* (*supra*), p. 297.

Do the "stated circumstances" prove that:

> "In other words, *it was the ordinary case* of the transfer *or sale of the check* by the defendant *and the purchase of it* by the bank * * *."
>
> *Burton* v. *United States* (*supra*), p. 297.

Does respondent mean to insist that the New York banks intended their delivery of their checks to the bankrupts to be the transfer of title *or sale* of said checks to the bankrupts, when they clearly indicated that said checks were payments to the depositor of the bankrupts, and not to the bankrupts themselves? Do the facts at bar allow respondent to allege of the bankrupts' banking house that:

> "It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn."
>
> *Burton* v. *United States* (*supra*), p. 297.

Finally, can this court decide on the record at bar, as it was decided in the *Burton* case, that:

> "From the time of the delivery of the check by the defendant to the bank, it became the owner of the check, it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and *no rights of defendant would have been infringed.*"

The New York banks were apparently attempting to discharge some obligations of foreign banks, such as Julius Baer & Co., and Poster Ungarische Commercial Bank, to petitioners (R., 28, 31). If any presumption is to be indulged in, it is that

when checks are delivered to the payee thereof or his agents, such checks were intended to discharge some debt or obligation to such payee of the drawer thereof, or the party by whose order the checks were drawn.

Nay v. *Curley,* 113 N. Y., 575, 577;
Marks v. *Kellogg,* 170 A. D., 464, 468, aff'd 220 N. Y., 615.

Let us reverse the situation. Suppose the checks in question were not paid by the New York drawers thereof. Would the obligations of foreign banks to petitioners be discharged by mere delivery of said checks to the bankrupt bankers herein? Of course not. Would the bankrupt bankers be liable for the amount thereof to petitioners in case of the dishonor of said checks? Certainly not. Could the bankrupt bankers have torn the checks up or thrown them in the fire with "no rights of petitioners infringed"? Clearly not.

We have been unable to find a single case where the doctrine of *Burton* v. *United States,* was applied to checks delivered by a depositor to the bank (in which he had a general checking account) *for collection and not for general deposit.* Indeed, in view of the state of the law with reference to checks deposited for collection, as set forth under Point Two of this brief (pp. 21-23; 29-32), the extension of the doctrine of *Burton* v. *United States* to the checks deposited for collection would be inconceivable.

That our view of the doctrine of *Burton* v. *United States* is correct is shown by the interpretation of this case by the Court of Appeals of the District of Columbia in *Dirnfeld* v. *Fourteenth Street Savings Bank,* 37 App. D. C., 11, where the court said at page 15:

> *"In the case at bar, we are not embarrassed by any restrictive endorsement of the check or by any special form of receipt. The endorsement was in blank,* and the deposit was entered in the bank book as cash. *Under such conditions* the rule in Maryland is that the bank becomes the owner of the paper by such endorsement." (Citing authorities). "The Court of Appeals was divided, and the rule was established by a majority. It may be, as contended by the appellee, that the decisions establishing the opposing view are in majority. *It would serve no useful purpose, however, to review the cases cited on each side of this vexed question, because we understand the question has been set at rest in this jurisdiction by a recent decision of the Supreme Court of the United States. Burton* v. *United States,* 196 U. S., 283-302; 49 Atl., 482-488; 25 Sup. Ct. Rep., 243."

The Circuit Court of Appeals for the Eighth Circuit in *First National Bank* v. *Federal Reserve Bank,* 6 Fed. (2nd), 339, 341, dealing with a case where the depositor delivered to the bank in which it had an account, checks endorsed generally, but in a separate paper instructed the bank to collect the same and place the proceeds thereof to its account with it, said:

> "Although the checks were endorsed in blank, they were endorsed and deposited to be transmitted for collection, and the credit given therefor in the account of the Lumber Company with the plaintiff bank was subject to the right to charge the checks back to such account if payment therefor in cash was not received. *Such being the facts,* the endorsement

did not transfer the title of the checks to the plaintiff" (*First National Bank of Eads* v. *Fleming State Bank*, 74 Colo., 309; 221, p. 891; *Burton* v. *U. S.*, 196 U. S., 283, 305; Notes 7 L. R. A. (N. S.), 694; 3 R. C. L., Par. 152, p. 524; 7 C. J., Par. 245, p. 597; id., Par. 246, p. 600).

Burton v. *United States* merely affirmed for the federal courts the New York rule prior thereto accepted in a majority of American jurisdictions, because preceding it, many federal cases held that in the absence of any agreement between the depositor and the bank, or any facts to the contrary, every deposit of checks by depositor was deemed to be "for collection," and, if prior to the collection the bank went into bankruptcy, the title remained with the depositor.

City of Philadelphia v. *Eckels*, 98 Fed., 485;
Richardson v. *Denegre*, 93 Fed., 572;
Beal v. *City of Somerville*, 50 Fed., 647 (approved by the Circuit Court of Appeals, 94 Fed., 442, 448).

While none of the federal cases on the point in question were cited in the *Burton* case, or expressly overruled therein, this court adopted there a different rule, generally known, as the New York rule. What is the New York rule on this point?

"In determining whether a bank, by the acceptance of a deposit of a check or draft, has become an absolute purchaser, or only an agent for collection, *reference is to be had to the intention of the parties, as evidenced by the fact and circumstances surrounding the*

deposit. The intention is a question of fact. *St. Louis Ry. Co.* v. *Johnston,* 133 U. S., 566, 576; *In Re Jarmulowsky,* 243 Fed., 632, 633."

First National Bank v. *Stengel,* 169 N. Y. Supp., 217, 220, affirmed in 185 App. Div., 906 and 227 N. Y., 659.

"Title passes only by contract to that effect, to be either expressly proved *or inferred from unequivocal course of dealing*" (*Scott* v. *Ocean Bank,* 23 N. Y., 289).

National Park Bank v. *Seaboard Bank,* 114 N. Y., 28, 34.

In the *Burton* case, this court cited with approval the following statement from *Metropolitan National Bank* v. *Loyd,* 90 N. Y., 530:

"If, as the appellant insist, the check had been deposited for a specific purpose—for collection—the property would have remained in the depositor; but there is no evidence upon which such fact could be established, *nor is it consistent with the dealings between the parties or with any of the admitted circumstances.*"

This court in the *Burton* case specifically limited the rule laid down therein to the "circumstances stated" which, as we have seen, included the most important fact that Senator Burton had the right to draw and in fact always drew against his deposits of checks before their collection by the Riggs National Bank. This court tersely pointed out in its opinion at p. 297, that:

"*There was nothing whatever in the evidence* showing any agreement or understand-

ing as to the effect of the transaction between the parties — the defendant and the bank — making it other than such as the law would imply from the facts already stated."

In *Sweeney* v. *Easter*, 1 Wall., 166 this court said at page 175:

> "*The second branch of the instruction asked is objectionable*, because it referred to the jury the interpretation of the endorsement on the paper, and also required of them to determine the case on the face of the paper and the custom of bankers alone, *without reference to the special facts proven in regard the course of dealing between defendants and Harris & Sons.*"

In *National Bank* v. *Insurance Company*, 104 U. S., 54, this court, speaking of another banking custom (that of the right to set off against depositor's account any debt that may be due to the bank), said at p. 71:

> "It attaches to such securities and funds, not only against the depositor but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied *or by conduct inconsistent with its assertion.*"

In *Re State Bank*, 56 Minn., 119, the court said, at page 123:

> "There is no question but that the general rule is that, upon a deposit being made by a customer in a bank, in the ordinary course of business, of money drafts or other negotiable

> papers, received and credited as money, the title vests in the bank, and the money drafts or other paper immediately becomes the property of the bank; and the bank becomes debtor of the depositor for the amount. And, *if no other facts appeared except these,* they would be held to conclusively show an intention of the parties that the paper should immediately become the property of the bank. *But, after all, the question is one of the agreement of the parties, either express or implied, from the general course of business between them.*"

We submit that careful examination of the opinion of this court in the *Burton* case, *supra,* will show that this court did not decide, as contended by respondent herein, that the intention of the parties to a banking deposit as to the nature of it shall be disregarded, and that in ascertaining said intention no consideration should be given to the course of dealing between the parties as evidenced by their transactions, but the relationship should be exclusively governed by an agreement, if any, between the parties as to the effect of the deposit.

POINT SIX.

Admitted facts herein, showing that petitioners never treated any of their deposits as cash, nor as an immediate credit, nor ever drew against their deposits before collection thereof by bankrupts, nor was it possible for them to so draw, nor were they indebted to the bankrupts at any time, conclusively establish, in the absence of any express agreement to the contrary, that petitioners had no right to draw against their deposits prior to the collection thereof by bankrupts, and that the relationship between them and bankrupts was that of principal and agent and not of creditor and debtor.

In *Burton* v. *United States*, 196 U. S., 283, this court merely affirmed the doctrine, that in the absence of facts establishing a course of dealing between the parties and in the presence of the fact that a depositor had a right to draw at once against his deposits of negotiable instruments to his current checking account with the bank, the title to negotiable instruments passed to the bank immediately upon making of such deposits. To establish such transfer of the title from a depositor to his bank, it is essential that there should be no course of dealing to the contrary, and that it should affirmatively appear that the depositor had a right to draw at once against his deposits without waiting for the collection thereof by the bank. As this court said in the *Burton* case, citing from *Metropolitan National Bank* v. *Loyd*, 90 N. Y., 530, 535:

> "The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed, *and the right of Murray to command payment at once was of the very nature and essence of the transaction.*"

In *Re Jarmulowsky,* 243 Fed., 632, the court after citing the general statement in the *Burton* case, so much relied on by respondent herein, said at page 633:

> "*The bank's right, however, depends upon the depositor's immediate and unconditional right and not merely as a favor to draw upon the deposit,* and if it appears that depositor did not have such a right till collection, the bank does not become the owner. (Citing authorities.)"

In ascertaining the relationship between the depositor and his bank, where he has a current checking account, *it is the intention* of the parties to treat the relationship as that of principal and agent or as that of debtor and creditor, which is all important. This principle pervades both the Federal and New York decisions discussing the cases dealing with deposits of negotiable instruments to the depositors' current checking accounts with their banks.

In *First National Bank* v. *Stengel,* 169 N. Y. Supp., 217, affirmed in 185 App. Div., 906 and 227 N. Y., 659, the court said at page 220:

> "In determining whether a bank, by the acceptance of a deposit of a check or draft, has become an absolute purchaser, or only an agent for collection, *reference is to be had to the in-*

> *tention of the parties,* as evidenced by the fact and circumstances surrounding the deposit."

In *Fifth National Bank* v. *Armstrong,* 40 Fed., 46, the court said on p. 49:

> *"The true criterion * * * is whether the depositor intended to part with title, and whether the receiving bank intended* to purchase the paper, and assume the risk of payment, and give an absolute credit therefor, as in cases of discount."

It is submitted that the admitted facts, showing the relationship between petitioners and bankrupts herein, conclusively establish:

(1) That petitioners had *no* right to draw against the deposits of negotiable instruments with the bankrupts prior to the collection thereof;

(2) That the course of dealing between petitioners and bankrupts was such as to indicate that *the relationship was that of principal and agent* and not of creditor and debtor.

The mere fact that no definite or express agreement as to the title to the deposits made by petitioners to their current checking account with bankrupts is proved by either party to this appeal, does not thereby entitle either party hereto to conclude that petitioners had a right to draw against their deposits of negotiable instruments immediately upon making the same. On the contrary the inference seems to be the other way.

In *Perth Amboy Gas Light Co.* v. *Middlesex County Bank,* 60 N. J. Eq., 84, 90, Pitney, V. C. (subsequently a member of this court) in a lengthy opinion discussing various legal consequences of

check deposits by a customer of the bank to his current check account with the same, said at p. 91:

> *"If a depositor deposits a check or draft on a third party with the understanding,* either expressed or implied, *that he is to draw against it at once as if it were cash,* and the bank agrees to accept it and treat it as cash and *the depositor draws against it before the amount is realized by the bank,* then it is properly treated as a deposit of cash. *Or if the depositor is already indebted to the bank,* and the deposit is received in whole or partial payment, the same result follows. *But in the absence of an understanding or situation of this kind it is a mere bailment."*

The record at bar shows that petitioners at the time the checks herein involved were deposited by them with the bankrupts, were not indebted to them (R., 9), nor did they ever or in this particular instance draw against their deposit with the bankrupts prior to the collection thereof by the same.

If, as Pitney, J., said *"in the absence of an understanding * * *, it is a mere bailment,"* then the checks herein must be deemed to have been delivered by the petitioners to the bankrupts for collection merely, and the title in the same remained in the petitioners prior to the actual collection thereof by the bankrupts.

The reason underlying the doctrine of the *Burton* case and the cases preceding and following it, has been repeatedly stated by the courts. All those cases are based upon the fact that where the customer has a right to draw at once against his deposit, his *deposits of negotiable instruments are deemed to be equivalent to deposits of money.* In

other words, in such case negotiable instruments delivered by the bank's customer to his account, against which he is allowed by the bank to draw at once, are deemed to be, as between the depositor and his bank, *deposits of cash.*

The following quotations were cited and approved by this court in the *Burton* case (pp. 302 and 303):

> "The general doctrine that upon a deposit being made by a customer, in a bank, in the ordinary course of business, *of money, or of drafts or checks received and credited as money,* the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question (*Commercial Bank of Albany* v. *Hughes,* 17 Wend., 94; *Metropolitan Nat. Bank* v. *Loyd,* 90 N. Y., 530)."
>
> *Cragie* v. *Hadley,* 99 N. Y., 131, 133.

> "It is not disputed that Murray held the check as owner—it was his property to do with as he pleased. He had held other checks. Some of these he placed in the Troy bank for collection; *others he deposited and took credit therefor as cash upon his passbook.* As to the first he could give and revoke his own directions as often as he chose, but as to the others when they were by his direction credited to him, the title passed to the bank, and they were not again subject to his control. This we understand to be the result of the general rule applicable to such transactions. *Scott* v. *Ocean Bank of New York,* 23 N. Y., 289; Story Bailm., Sec. 88; *Keene* v. *Collier,* 1 Metc. (Ky.), 415; *Brahm* v. *Adkins,* 77 Ill., 263;

Chapman v. *White*, 6 N. Y., 412; 57 Am. Dec., 464; *Bank of the Republic* v. *Millard*, 10 Wall., 152; *In re Franklin Bank*, 1 Paige, 254; 19 Am. Dec., 413; *Clark* v. *Merchants' Bank*, 2 N. Y., 380."

Metropolitan Natl. Bank v. *Loyd*, 90 N. Y., 530, 534, 535.

"*So when, without more, a bank receives upon deposit a check indorsed without restriction, and gives credit for it to the depositor as cash in a drawing account*, the form of the transaction is consistent with and indicates a sale, in which, as with money so deposited, the check becomes the absolute property of the banker."

Taft v. *Quinsigamond Natl. Bank*, 172 Mass., 363, 364, 365.

The same doctrine was stated in many other cases:

"*The checks were credited as money*, and were indorsed by the payee without restriction. The defendant did not hold them as a mere agent for collection. It held them as owner (*Cragie* v. *Hadley*, 99 N. Y., 131; *Met. Nat. Bank of N. Y.* v. *Loyd*, 90 N. Y., 530; *Burton* v. *U. S.*, 196 U. S., 283, 302, 304; *Taft* v. *Quinsigamond Nat. Bank*, 172 Mass., 363"

Heinrich v. *First National Bank*, 219 N. Y., 1, 5.

"*If a depositor deposits a check or draft on a third party with the understanding*, either expressed or implied, *that he is to draw against it at once as if it were cash, and the bank agrees to accept it and treat it as cash*, and the depositor draws against it before the amount

is realized by the bank, *then it is properly treated as a deposit of cash.*"

Perth Amboy Gas Light Co. v. *Middlesex County Bank,* 50 N. J. Eq., 84, 91 (per Pitney, J.).

"By the usage of bankers, the teller, with whom such deposits (of checks) are generally made, *has no authority to receive them as and for money,* and this known to the depositor; but the teller has authority to receive checks for collection, and, therefore, the presumption is, that they were received for that purpose until the contrary is shown."

Strong v. *King,* 35 Ill., 9, 20.

The facts at bar do not show that there was no agreement at all between the petitioners and the bankrupts. It is alleged by petitioners and admitted by the respondent:

"That petitioners had no agreement with said Knauth, Nachod & Kuhne *to treat* evidences of debt deposited with Knauth, Nachod & Kuhne for collection, or otherwise, *as a deposit of cash, nor that an immediate credit* should be given by said Knauth, Nachod & Kuhne to petitioners upon such evidences of debt" (R., 6).

The conclusion from that allegation and the admission (R., 21) thereof by the trustee, is two-fold. Either there was an agreement to treat the deposits of petitioners with the bankrupts in some manner other than as "deposits of cash" or as "an immediate credit," but such agreement was not proved by either party hereto and hence does not appear

in the record herein; or that in the absence of such agreement, the course of dealing between the parties as showing their intention, should naturally govern the title to negotiable paper deposited by petitioners to their current checking account with the bankrupts.

It is alleged by the petitioners and admitted (R., 21) by the respondent:

> "*That petitioners did not treat* evidences of debt deposited with said Knauth, Nachod & Kuhne for collection, or otherwise, *as a deposit of cash, nor as an immediate credit* open to petitioners by said Knauth, Nachod & Kuhne upon receipt of any evidences of debt, nor did petitioners draw upon said Knauth, Nachod & Kuhne against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said Knauth, Nachod & Kuhne" (R., 6, 7).

A customer of the bank having a current checking account with it may make his deposits in either of the two following ways, to wit: as cash or for collection. It is admitted here by the respondent that the petitioners did not have an agreement with the bankrupts to treat their deposits as cash, nor did they ever, in fact, treat the same as cash or as an immediate credit. Hence, their deposits were for collection, and, consequently, the very reason upon which the decisions in the *Burton* case and the other cases above cited were based, i. e.; that the deposits there were either treated or agreed upon to be treated as moneys or cash, does not apply to the case at bar.

Again, the "unequivocal course of dealing"

(*National Park Bank* v. *Seaboard Bank*, 114 N. Y., 28, 34), between petitioners and the bankrupts herein indicates that petitioners never drew against their deposit of checks prior to the collection thereof by the bank, that they had no agreement with the bankrupts allowing them to draw against deposit of checks by them prior to their collection, that they had no agreement that they should be credited with the proceeds of their checks as cash, immediately upon the deposit thereof with the bankrupts, nor did they ever treat their deposit of checks as a deposit of cash (R., 6, 7, 22), (all of which facts are admitted by the respondent in the case at bar) (R., 21). These facts completely negative respondent's contention, that petitioners had a right to draw against their deposits prior to their collection by the bankrupts.

The question whether circumstances surrounding the deposit of checks or showing the dealings between the depositor and the bank are controlling on the question of the intention of the parties to pass the title to the checks, was discussed at length by this court in *St. Louis & San Francisco Ry. Co.* v. *Johnston*, 133 U. S., 566, where Chief Justice Fuller said at pages 573 and 574:

> "It was a sight draft drawn by the San Francisco Company on its debtor in Boston, and collected through the Marine Bank's correspondent at that place. Neither it, nor the money collected upon it, passed into the hands of any third person for value. The collection was made after the Marine Bank had closed its doors. *It is not claimed that there was any express arrangement or understanding between the San Francisco Company and the bank that the deposits of out-of-town paper should be*

treated as cash. Can such an understanding be implied from the mere fact that the San Francisco Company was credited with the draft upon the books of the bank, as if the deposit were of money, although the deposit ticket named it under the head of checks, and that the Company itself added on the stubs of its check-book such deposits to the current amount, coupled with an alleged commercial usage to allow good customers to draw against a credit thus created? In five years of business between them, the San Francisco Company had never drawn against such paper. The evidence of the bank's clerks leaves no doubt that, as to out-of-town drafts for large amounts, the bank kept track of them and reserved the right to charge exchange and also interest for the average time taken in collection, notwithstanding its agreement to pay interest on the daily balances. This was not consistent with the theory of an understanding between the bank and the Company that the title to this and similar drafts should pass absolutely to the bank."

In *Scott* v. *Ocean Bank*, 23 N. Y., 290, 291, the facts were stated by the court to be as follows:

"All that is found in relation to such dealings is that Lyell, who was a banker in Detroit and kept an account with that company at its office in the City of New York, made from time to time, between June, 1857, and the 24th of August in that year, remittances to it and drew drafts upon it; that he was a large depositor with it of money and bills; that there was an arrangement between him and it, that

> he should be allowed interest at the rate of 4% per annum on his average balances * * * that the bill was on day of its receipt accepted by the drawees on presentation, and returned to the company, in whose possession it remained till its transfer to defendant on the 24th day of the same month, and that Lyell had at that time not been credited with said bill by the company * * *."

The court summed up its conclusions at page 292 thus:

> "When, therefore, it appears that the bill in question was retained in the possession of the company, after its acceptance, and that no credit had been given for it at the time it was passed to the defendant, and when nothing is disclosed in the whole course of dealings between the parties to show that any bill was ever credited or agreed to be credited in account before its collection, *or that Lyell ever drew or was entitled to draw upon the company, or that it was bound to accept drafts otherwise than upon and for funds actually received in cash, it must be considered that the company at the time of the transfer stood in the relation of agents for its collection merely. There is no ground based on these dealings (and no other is claimed), for the conclusion that the ordinary relation of debtor and creditor between the company and Lyell in relation to the bill in question existed, or that it had become, as between them, the property of the company.*"

In the *Johnston* case, *supra,* this court held that the fact that the San Francisco Company "*had*

never drawn" against their deposits and that the bank "reserved the right to charge exchange and also interest for the average time taken in collection, notwithstanding its agreement to pay interest on the daily balances"—"was *not* consistent with the theory of an understanding between the bank and the company that the title to this and similar drafts should pass absolutely to the bank."

In the *Scott* case, *supra*, the court held that because it was not shown to it "that Lyell ever drew or was entitled to draw upon the company, or that it was bound to accept drafts, otherwise than upon funds actually received in cash" there was no ground "for the conclusion that the ordinary relation of debtor and creditor between the company and Lyell in relation to the bill in question existed, or that it had become as between them, the property of the company."

IN THE CASE AT BAR, RESPONDENT ADMITTED:

> "That petitioners had no agreement with said K. N. & K. to treat evidences of debt deposited with said K. N. & K. for collection or otherwise as a deposit of cash, nor that any immediate credit should be given by said K. N. & K. to petitioners upon the receipt of such evidences of debt" (R., 6).
>
> "That petitioners did not treat evidences of debt deposited with said K. N. & K. for collection and otherwise, as a deposit of cash, nor as an immediate credit open to petitioners by said K. N. & K. upon the receipt of any evidences of debt, nor did petitioners draw upon said K. N. & K. against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said K. N. & K." (R., 6, 7).

"That your petitioners did not draw upon said K. N. & K. against said account as aforesaid, before the collection said by K. N. & K. of the moneys due upon such evidences of debt as were deposited by the petitioners herein to their account with said K. N. & K." (R., 22).

"That at the time petitioners herein caused said checks hereinbefore described to be delivered to said K. N. & K., petitioners had a credit balance with said K. N. & K. amounting to several thousand dollars and were not then, and have not been at any time since then, and are not now, indebted to said K. N. & K. or to said Receiver" (R., 9).

Thus petitioners, standing squarely on the decision in the *Burton* case, are clearly entitled to reclaim the amount of the checks in question on the ground that upon the undisputed facts showing the course of dealings between them and the bankrupts, it is evident that petitioners had no right to draw against their deposit of checks prior to the collection thereof by the bankrupts and that respondent failed to tender any evidence whatsoever in support of the existence of such right on the part of the petitioners in the case at bar. As this court said in the *Johnston* case, *supra,* at pages 575 and 576:

"If there be no bargain that the property should be changed, the relation resembles that of principal and agent. *Mere liberty to draw does not make out such a bargain* * * *."

"*The question was one of fact rather than of law, and we think there should be something more in the evidence tending to establish that the San Francisco Company understood that*

*the bank had become owner of the paper, than these mere credits for convenience, before that can be held to be the fact * * *.*"

It follows therefore that the checks herein were deposited by the petitioners for collection, and not being collected prior to the filing of the petition in bankruptcy herein, title to said checks, and to the proceeds thereof collected by the receiver, is in the petitioners.

In re Jarmulowsky, 249 Fed., 319, 320, 321, 322;
In re Havens, 8 *Bened.*, 309, 310, 311;
Levi v. *National Bank of Missouri,* 5 Dill., 104, 106, 109;
Manufacturers' National Bank v. *Continental Bank,* 148 Mass., 553, 558, 559;
First National Bank v. *First National Bank,* 76 Ind., 561, 569, 570;
Morse on Banks & Banking (5th Ed.), Section 567.

POINT SEVEN.

Petitioners duly fulfilled the duty of tracing the proceeds of their checks to the specific funds in the hands of the trustee in bankruptcy.

The checks of the petitioners were deposited with the bankrupts on June 15th, 1923 (R., 8). The petition in bankruptcy against Knauth, Nachod & Kuhne was informally filed with the judge of the court at 10:30 P. M. on June 15th, 1923, and formally filed with the Clerk of the court at 9:30 A. M. on June 16th, 1923 (R., 5).

Knauth, Nachod & Kuhne, after closing their business at 3 P. M. on June 15th, 1923, never reopened their offices for business thereafter. The proceeds of said checks were collected by the Receiver in bankruptcy during the business hours of the morning of June 16th, 1923, through the American Exchange National Bank (R., 8), and the proceeds thereof went to swell the current checking account of the bankrupts with said American Exchange National Bank. The balance of said account, which had not been operated thereafter by the bankrupts, was finally fixed by the American Exchange National Bank at $212,127.86 (R., 53).

At the time of filing the petition in bankruptcy herein, the bankrupts were indebted to the American Exchange National Bank in the sum of $250,000 (R., 52, 53), secured by deposit of bonds and stocks which, taken at their then market value, exceeded the amount of said loan (R., 10).

Thereafter and pursuant to the instructions of the Receiver, the American Exchange National Bank sold some of the said securities deposited as collateral for said loan with it, and applied the proceeds of said sales to the liquidation of said loan (R., 52, 54, 55, 56). Then, on July 12th, 1923, the American Exchange National Bank, *pursuant to the instructions of the Receiver,* applied the balance of said current checking account between it and the bankrupts, i. e., $212,066.16, to the payment of the balance of said loan then amounting to $229,503 and $1,140.99 interest thereon. On the same day the Receiver delivered to the American Exchange National Bank his check for $18,851,83 in liquidation of the balance of said loan and the American Exchange National Bank delivered to the Receiver the balance of the stocks and bonds held by it as a collateral for said loan (R., 57, 58, 59).

It is clear from the above facts that, since the bankrupts did not operate their current checking account subsequent to the deposit and collection of the petitioners' checks therein, the proceeds thereof were part of the final amount thereof, i. e., said sum of $212,066.16. It is also evident that the Receiver, and not the bank, having applied the proceeds of petitioners' checks to the liquidation of the bankrupts' loan, instead of using general funds of the bankrupt estate in his hands for said purpose, thereby swelled the general funds by the amount of the proceeds of said checks, to wit, $16,294. However, it is immaterial whether said transaction was made by order of the Receiver or otherwise, because it was the duty of the bank having collateral to first apply the collateral to the liquidation of the loan and then to resort to the balance of the current checking account of the bankrupts with it.

Smith v. *Savin,* 141 N. Y., 315;
Baker v. *Davie,* 211 Mass., 429, 441;
Pomeroy, Equity Jurisprudence, Sec. 396.

The law is well settled that if the lowest balance of the current checking account of the bankrupt bank exceeds the amount of checks deposited with it for collection with another bank, that balance is supposed to contain the proceeds of such checks, and the depositors of said checks are deemed to be preferred creditors as to the sums due to them against said balance of said current checking account.

In re Brown, 193 Fed., 24, affirmed as *Schuyler* v. *Littlefield,* 232 U. S., 707;
Central Natl. Bank v. *Conn. Mutual Life Ins. Co.,* 104 U. S., 54, 66, 69;
Allen v. *United States,* 285 Fed., 678, 681;

In re Jarmulowsky, 258 Fed., 231;
In re Bolognesi, 254 Fed., 770, 773;
Titlow v. *McCormick*, 236 Fed., 209, 215;
Southern Cotton Oil Co. v. *Elliott*, 218 Fed., 571;
In re See, 209 Fed., 174;
Empire State Surety Co. v. *Carroll County*, 194 Fed., 605;
City of Philadelphia v. *Aldrich*, 98 Fed., 487, 488.

The same rule applies if a specific fund traced is not a balance of a current checking account but securities.

In re Gay & Sturgis, 251 Fed., 420.

And the doctrine is not effected by the fact that withdrawals are made by the bankrupt bank from its current checking account, because the first funds withdrawn from said account are deemed in law to be the bank's own funds and not proceeds of checks deposited with it for collection, as the latter constitute trust funds.

Brennan v. *Tillingast*, 201 Fed., 609;
Empire State Surety Co. v. *Carroll County*, 194 Fed., 593, 605;
Board of Commissioners v. *Strawn*, 157 Fed., 49, 51;
City of Philadelphia v. *Aldrich*, 98 Fed., 487, 488.

The petitioners are also entitled to recover from the trustee herein the proceeds of their checks deposited with the bankrupts for collection, on the ground that the Receiver's action in using their funds to pay the loan of the bankrupts to the Amer-

ican Exchange National Bank swelled the general fund in the hands of the trustee, held by it for the benefit of the creditors.

Gorman v. *Littlefield,* 229 U. S., 19;
Lowell v. *Brown,* 284 Fed., 936, 944;
In re Dunn & Co., 193 Fed., 212, 216;
In re Atcheson Co., 170 Fed., 427, 429;
In re Ryea's Estate, 143 Fed., 182, 183, 184;
Beard v. *Independent District,* 88 Fed., 375, 379;
Laport v. *Carpenter,* 91 Hun (N. Y.), 76, 81.

Finally, when the Receiver used the proceeds of the checks of petitioners to pay the loan of bankrupts, he thereby subrogated petitioners to the rights of the American Exchange National Bank to sell the shares and bonds held by it as a collateral for the satisfaction of its loan to the bankrupts, and made said shares and bonds a specific fund in the hands of the trustee herein, which must be liquidated to pay in full the sums due to petitioners as the proceeds of their said checks.

In re Gay & Sturgis, 251 Fed., 420, 422;
In re Leavitt & Grant, 215 Fed., 901;
In re Keating, 71 Fed., 29, 37;
Cole v. *Malcolm,* 66 N. Y., 363, 366;
Pease v. *Egan,* 121 N. Y., 262, 272;
Young v. *Pecos County,* 46 Tex. Civ. App., 319, 323, 326.

Conclusion.

The law involved in this case is of utmost importance to depositors and banks throughout the country and the decision of this court on the points

involved will clarify one of the most mooted and uncertain branches of banking law.

The reversal of the decision of the Circuit Court of Appeals in regard to the check for $1,294 would mean that the banks would be deemed to be purchasers of all the checks deposited with them by the customers to the current checking accounts with them, when said checks are endorsed generally, and a bookkeeping credit given therefor prior to their collection, regardless of the circumstances surrounding the delivery thereof. It would mean that depositors of generally endorsed checks would lose their right to retain title to the proceeds thereof as against the banks wherein they have a current checking account by any means. It would mean that the course of dealings between the depositor and the banks should be disregarded in ascertaining title to the checks deposited by the latter to their current checking accounts with said banks. It would mean a further impairment of the rights of the depositors in their dealings with their banks, and the relaxation of the responsibility of the banks to their depositors conferring on the latter benefits of a highly controversial nature.

The affirmance of the decision of the Circuit Court of Appeals in regard to the check for $15,000 would mean that the bank could disregard the instructions of its customers unless there were written on the negotiable instrument itself, by a simple device of delivering the same to another bank for collection, instead of collecting the same itself. It would mean that depositors of generally endorsed checks would lose their right to retain title to the proceeds thereof as against the banks wherein they have a current checking account by any means other than some writing on the checks themselves. It would mean that a premium will be

placed upon dishonesty of the bank in withholding said instructions from its correspondent bank. It would finally mean the abolition of the safe and sound rule of law that technical expressions having settled legal meaning should be deemed to have been used in that sense, in the absence of any evidence to the contrary.

We ask the affirmance of the decision as to the check for $1,294 and the reversal of the decision as to the check for $15,000 for the sake of uniformity and constancy of our commercial and banking law.

The decision of the Circuit Court of Appeals as to the check for $1,294, should be affirmed and as to the check for $15,000 should be reversed with costs.

Respectfully submitted,

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